(1)

Supreme Court, U.S.
FILED

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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROBERT W. KEARNS,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petiton for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT W. KEARNS, Ph.D.
Manufacturing-Inventor
301 Houghton Laboratory Lane
Queenstown, Maryland 21658
(410) 827-9337

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

QUESTIONS PRESENTED

The questions presented by this petititon are:

1. Whether under the separation of powers doctrine, the Judicial Branch's operations under Title 35 § 281 prohibits the Executive Branch, operating under Title 35 from attaining the Legislative Branch's Constitutional choice, presented at Art. I, § 8, Cl. 8, to promote the progress of science and the useful arts by unduly impeding inventors through Title 28 civil action from receiving the Constitutional standard of compensation reserved to inventors, namely, the securing to them of the time period to exclude others from making, using or selling their U.S. patented inventions.

2. If the Constitutional standard of compensation is not presently attained by inventors, whether the patent holder is entitled to have the time period returned

that is consumed in judicial review during an unsuccessful challenge to a patent.

Petitioner believes this case calls for an exercise of this Court's power, supervision, and rule making responsibilities as the lack of promulgated rules for the 35 U.S.C. § 281 remedy accompanying multiple civil actions for the defendants following their infringement of a 'too successful' U.S.invention in use throughout the western world has sanctioned a departure from the accepted and usual course of judicial proceedings that has not recognized: the loss to our Nation's trade; the loss to our citizen's standard of living; the placing of an unfair burden on a lone District Court (Senior) Judge; and the loss of opportunity to demonstrate the principle that persons of all classes, races and color can find equal rights and opportunities under the Constitution's Art. I, § 8, Cl. 8.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert W. Kearns, Ph.D., ("Bob") appearing *pro se* respectfully prays that the Court issue a writ of certiorari to review the judgment (August 31, 1994) and opinion (July 26, 1994) of the U. S. Court of Appeals for the Federal Circuit in *Robert W. Kearns* v. *General Motors Corporation*, ("GM") No. 93-1535.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit ("CAFC") is located in the Appendix at page 1("A-1").The district court's opinion (A-14) is unreported and includes reference to a transcript of 21 July 1993 (A-16).

JURISDICTION

The CAFC opinion was dated July 26, 1994. Dr. Kearns' petition for rehearing (A-44) was denied on August 24, 1994. Dr. Kearns' application for enlargement of times and for this petition to be serial-

ized with a petition for *Kearns* v *Chrysler Corporation and American Motors Corp.* and other on-going Appellant Briefs due at the CAFC was granted (A-329) by order of this Court dated 8 November 1994 with the time enlarged to and including December 22, 1994. Jurisdiction to review the judgment by writ of certiorari is conferred upon the Court by 28 U.S.C. § 1254(1) (1988). The district court had jurisdiction over the claim in the first instance under the provisions of 35 U.S.C. § 1338(a) (1970).

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 8, Clause 8

"The Congress shall have the power:

> To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

STATUTE INVOLVED

35 U.S.C. § 281, Patents, provides:

> **§ 281. Remedy for infringement of patent**

A patentee shall have remedy by civil action for infringement of his patent. July 19,1952, c. 950, §1, 66 Stat. 812.

35 U.S.C. § 283, Patents, provides:

§ 283. Injunction

The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable. July 19,1952, c. 950, § 1, 66 Stat. 812.

SIXTH CIRCUIT RULE INVOLVED

That a Senior Judge can't adjudge a case outside his district if a case on his docket is there more than five years.

TITLE 28 § 1654 RULE INVOLVED

Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.
(As amended May 24,1949, c. 139, § 91, 63 Stat. 103.)

STATEMENT OF THE CASE

The parties.

General Motors Corporation is predominantly an assembler of motor vehicles which

are marketed throughout the western world.

As reported in the New Yorker[1]:

> Bob Kearns grew up in River Rouge, a working-class neighborhood on the west side of Detroit. Two things about the place captured Kearns' imagination. One was Our Lady of Lourdes Cathedral, a big red brick Catholic Church, which he remembers, imported water from the real Lourdes. The other thing was the Ford Motor Company's Rouge plant, the largest industrial complex in the world.

Bob learned his first skills as a drafts-man in the job shops that made Detroit the "Arsenal of Democrary"during World War II. Employment was limited to that particular "job". Should a bid be too high, the "job" still had to be done and one could find it again after being discharged. Frequently, it was located further down the street.

Bob's Kearns *Engineers* provided design & build engineering services throughout

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[1] *The New Yorker*, Annals of Invention: Windshield-wiper wars: *The Flash of Genius* by John Seabrook, January 11, 1993 issue.

Detroit and its suburbs from 1957 to 1963. Bob and his family developed, manufactured and sold patented products from 1963 until 1979, one year after his court litigation began[2]. They sold the patented products direct and through manufacturer representatives throughout the U.S.of A., and in France and Japan[3]. The patented products were marketed under the trademark *Computer Central*©. The family's foreign trades were made under export licenses issued by the Department of Commerce.

Thru Kearns *Engineers* Bob sought to provide better opportunities and job se-

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[2] Dr. Kearns suffered a disabling emotional breakdown in 1976 within a month of learning first hand that Daimler-Benz Aktiengesellschaft ("Mercedes") was infringing his IWWS patents.

[3] Bob's manufactured-invented products were sold under the trademark *Computer Central*© as shown at A-81.

curity for his employees by developing patented products to manufacture and market.

Some basic economics involved.

Should Helen pay her sister Rose $10 to clean her room; and Rose pay $10 to their sister Mary to baby-sit her child; and Mary pay $10 to Helen to tune her car's engine; how does this economic activity help their Uncle Sam to pay their rent? It doesn't. Someone must go outside the family, earn money, and bring it within the family to 'pay the rent.'

The public within the U.S. of A. borders is such a family. It is necessary for someone in our U.S. family to go outside our borders and earn money for us to pay for Saudi oil and Japanese electronics.

In the last quarter of this year, the U.S. of A. usual trade deficit rose from $30 billion to $41 billion. Bob's sale of

his control module, that converts standard windshield wiper systems to intermittent operation, to the defendants in Detroit's court[4] would make a difference of 1.2% in reducing the usual trade deficit. Should Bob sell to the defendants the other windshield wiper components controlled by his patent claims the difference is 4.8%.

Bob's litigation saga began in October 1963.

1. Bob's litigation saga began in October 1963 when he sought from the Ford Motor Co. and the Chrysler Corp. engineering specifications applicable to his transistorized Windshield Wiper System with Intermittent Operation ("IWWS")[5] that includes a Moisture Responsive Dwell Interval feature. Bob believes his IWWS without the

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[4] U.S. District Court for the Eastern District of Michigan Southern Division

[5] U.S. patent 3,351,836 *et cetera*.

moisture responsive dwell feature is not as safe as is continuous wiping.

In all the years of the Viet Nam War, nominally, 50,000 U.S. citizens died. Each year on our Nation's roads, 55,000 people die in wet weather automobile accidents when wet weather doesn't occur half the time.

Bob began to work *pro bono publico* with Ford, Chrysler and GM managers and engineers to integrate IWWSs into their automobile models. During a deposition, one Ford engineer responded in discussing the IWWS assembled into Ford's 1969 model, "Oh, Dr. Kearns was on the design team!" Bob was invited into Ford engineering by Executive Engineer Joe Neill in 1964 and met with Ford engineers 1-5 afternoons a month for 18 months in the Advanced Electrical Design Group headed by Ed Milligan. For Ford, Bob submitted reports, drawings and

built his models into Ford cars at Kearns *Engineers* for their test. Finally, he was told, "An all Ford IWWS has been developed - don't come back!"

At Chrysler, Bob worked through Gene Jacoby, Mgr. of Product Planning; Bill Williams, S.R. Ward and Glen Farison of engineering; Mr. Tennant, Purchasing. Bob submitted drawings, reports and built his IWWSs into three automobile models for tests; submitted complete quotations with 20 pre-production samples that met or exceeded their Performance Standard - 6338. One model was tested for 9 months (A-46). At that time Chrysler sought a loan from the U.S. Treasury and wrote to Bob "We cannot afford your quotation." "Chrysler is telling you, Bob, it's cheaper to steal." was Bob's lawyer's comment.

At Daimler-Benz (Mercedes) and Dr.Ing. h.c.f. Porsche A.G. (Porsche) in Germany

Bob submitted complete quotations, drawings and pre-production samples.

For GM, for example, Bob adapted his IWWSs in November, 1964 to use their "E" type wound-field wiper motors; in January, 1965 Bob adapted a Cadillac for his IWWSs; in June'67 he conducted demonstrations for

Elmer Reece;
John Dobb, New Devices;
Don Selvecki, Patent Attorney;
Charles Foehl - Plants Mgr.;
Landis Kurz, Dir of Reliability;
R.K. Shewmon, Chief Engineer;
Fred Hobbs, Personnel Director;
Warren Wiese, Technical Center;
Ed Czabor, Engr.;
Dick Edwards,
Gil Lambert
& Don Sipple, of #5.

Around June 22,'67 Bob adapted designs to use a Chevy II Switch with their wound-field wiper motors in a circuit for Chevy. Bob developed a moisture sensitive IWWS dwell feature for GM witnessed by James G.H. Quan on 18 December 1967 that used their production wiper motor.

Bob's lawyers sought purchase orders.

How do you sue your only customers who control your market[6]?

2. Bob began to file Complaints in March, 1978.[7] He sought 28 U.S.C. § 281 remedies

---

[6] Ltr from Robert W. Kastenmeier, Chairman, Subcommitte on Courts, Civil Liberties and the Administration of Justice to Commissioner of Patents & Trademarks Quigg.(A-55)

[7] A presentation of the case styles is:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SWF-SPECIALFABRIK fur
AUTOZEBEHOR GUSTAV RAU G.m.b.H.,
a corporation of the Federal
Republic of Germany
Plaintiff,
v. Civil No. 78-CV-70642

ROBERT W. KEARNS,
Defendant-Plaintiff,
v.

WOODS MOTORS, INC., DAIMLER-
BENZ AKTIENGESELLSCHAFT, and
DR. ING. h.c.f. PORSCHE A.G.,

Defendants.

ROBERT W. KEARNS,
Plaintiff,
v. Civil No. 82-70749

FRED LAVERY PORSCHE, WOOD
MOTORS, INC., VOLKSWAGEN
WERKE A.G. WOLFSBURG, and
AUDI NSU AUTO UNION, A.G.
Defendants.

ROBERT W. KEARNS,

Plaintiff,

v. Civil No. 85-70459

FERRARI S.p.A.,
AB-VOLVO,
ALFA ROMEO S.p.A.,
AUTOMOBILES-CITROEN, S.A.
BAYERISCHE MOTOREN WERKS, A.G.,
B-L, PLC (British Leland)
FUJI HEAVY INFUSTRIES, LTD.
GROUP LOTUS CARS CO.
HONDA MOTOR CO.
ISUZU MOTOR CO., LTD.
MITSUBISHI MOTORS CORP.
NISSAN MOTOR CO., LTD.
OFFICIENE ALFIERE MASERATI,
PEUGEOT, S.A.
REGIE NATIONALE RENAULT
ROLLS ROYCE MOTORS, LTD.
SAAB-SCANIA AB,
TOYO KOGYO CO., LTD (Mazda)
TOYOTA MOTOR CO., LTD

Dealers in the Detroit area:

BARNETT PONTIAC-DATSUN, INC.
BAVARIAN MOTOR VILLAGE, LTD
DALGLIESH CADILLAC-PEUGEOT
JOE DWYER SUBARU VOLVO, INC.
FALVEY OF TROY
GROSSE POINTE AMC-JEEP RENAULT
LA FONTAINE TOYOTA
SEAWAY MOTORS, INC.
SPORTS CAR EXCHANGE, INC.
TAMAROFF BUICK-DMC-HONDA-ROLLS ROYCE, and
WOOD MOTORS, INC.

Defendants.

ROBERT W. KEARNS,

Plaintiff,

v. Civil No. 85-70461

GENERAL MOTORS CORPORATION,

Defendant.

ROBERT W. KEARNS,

Plaintiff,

v. Civil No. 92-71408DT

UNITED TECHNOLOGIES CORP., and
UNITED TECHNOLOGIES AUTOMOTIVE, INC.

CASES IN CANADA

Court No.	Case
	Kearns v:
T-1749-85	*FUJI HEAVY INDUSTRIES, LTD., SUBARU AUTO CANADA, LTD.;*
T-1750-85	*AUTOMOBILES-CITROEN, S.A., PEUGEOT S.A. PEUGEOT CANADA LTD./ PEUGEOT CANADA LTEE;*
T-1758-85	*AB VOLVO and VOLVO CANADA LTD.;*
T-1759-85	*B-L, PLC and JAGUAR CANADA INC.;*
T-1760-85	*FORD MOTOR COMPANY OF CANADA LIMITED/ FORD DU CANADA LTEE AMERICAN MOTORS CORP. AMERICAN MOTORS (CANADA) INC.;*
T-1761-85	*ISUZU MOTOR CO., LTD.;*
T-1762-85	*FERRARI S.p.A.;*
T-1763-85	*SAAB-SCANIA A.B.;*
T-1764-85	*MITSUBISHI MOTORS CORP.;*
T-1765-85	*OFFICIENE ALFIERI MASERATI, S.p.A.;*
T-1766-85	*TOYOTA MOTOR CO., LTD.*, and *TOYOTA CANADA INC.;*

Court No.	Case
T-1767-85	*NISSAN MOTOR CO., LTD.*, and, *NISSAN AUTOMOBILE COMPANY (CANADA) LTD./ AUTOMOBILES NISSAN DU CANADA LTEE;*
T-1768-85	*CHRYSLER CORPORATION*, and *CHRYSLER CANADA LTD./ CHRYSLER CANADA LTEE;*
T-1769-85	*ROLLS ROYCE MOTORS, LTD.* and *ROLLS ROYCE MOTOR CARS LIMITED/ ROLLS ROYCE MOTOR CARS LIMITEE;*
T-1770-85	*REGIE NATIONALE DES UNINES RENAULT, AUTOMOBILES RENAULT CANADA LTEE;*
T-1771-85	*GROUP LOTUS CARS COMPANY, PLC;*
T-1772-85	*GENERAL MOTORS CORP.* and *GENERAL MOTORS OF CANADA LIMITED/ GENERAL MOTORS DU CANADA LIMITEE;*
T-1773-85	*BAYERISCHE MOTOREN WERKE*, and *BMW CANADA LTD. BMW DISTRIBUTORS EASTERN CANADA, LTD.;*
T-1774-85	*ALFA ROMEO, S.P.A. ALFA ROMEO (CANADA) LTD./ ALFA ROMEO (CANADA) LTEE. FIAT AUTO, S.P.A. FIAT AUTO CANADA, LTD.;*
T-1775-85	*HONDA MOTOR CO., LTD.*, and *HONDA CANADA INC.;*
T-1776-85	*TOYO KOGYO COMPANY, LTD. MAZDA CANADA INC.;*
T-1777-85	*DR. ING. h.c.F. PORSCHE A.G. AUDI NSU AUTO UNION A.G. VOLKSWAGENWERK A.G. WOLFSBURG SWF-SPECIALFABRIK fur AUTOZUBEHOR GUSTAV RAV G.m.b.H. VOLKSWAGEN CANADA INC.;*

for infringement of his Intermittent Windshield Wiper Systems ("IWWS"). IWWSs are now assembled into models from every automobile assembler in the western world.

Through the Fed. R. Civ. P. Ford lawyers alleged to Bob's lawyers from 1968 until a month before trial in 1990 that Ford IWWSs did not infringe Bob's patents.

3. There are no trials currently scheduled in any of the styled cases. All the cases in Detroit have been dismissed by Judge Cohn. Judge Cohn approves of the abandonment of the Canada cases by Bob's former counsel as he has denied Bob a counterclaim against that conduct and has been lavish in sharing $6.5 million of Bob's jury awards with them.

Court No.	Case
T-1967-85	*DAIMLER-BENZ AKTIENGESELLSCHAFT* *MERCEDES-BENZ CANADA INC.* *ROBERT BOSCH G.m.b.H.* *ROBERT BOSCH INC..*

Motion for Preliminary Injunctions was denied by Judge Pratt.

4. In 1979, Bob's 2d trial attorney filed a Motion for Preliminary Injunctions which was denied opining:[8]

> It is true that if plaintiff's patent were to expire prior to a decision finding the patent valid and infringed the plaintiff's anticipated position as a major supplier of the windshield wiper systems would be undermined. The short answer to this contention is that this action will be completed before the expiration date of plaintiff's patent. The Court would therefore be able to enjoin the infringement of this patent if plaintiff is successful on the merits and plaintiff would be allowed the marketing foothold which he fears would otherwise be lost.
>
> Pursuant to the foregoing, the Court will deny plaintiff's Motion for a Preliminary Injunction.
>
> IT IS SO ORDERED.
>
> PHILIP PRATT
> United States District Judge
> Dated: January 10, 1980
> Detroit, Michigan

5. The District Court in Detroit had

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[8] Judge Phillip Pratt died in 1988 after a year of illness. He was replaced by Judge Cohn.

nearly five years to make Judge Pratt's decision to preliminary injunctions come true before Bob's patent 'Windshield Wiper System with Intermittent Operation' would routinely expire. On August 23, 1984, months before his first IWWS patent was to expire, Bob, with the permission of his 3d trial attorney, filed *Robert W. Kearns* v. *United States* in the U.S. Court of Claims [No. 436-84C] pointing to Art. I § 8 Cl. 8 as he is still doing in this petition. The statutory basis for jurisdiction of the Court of Claims was directed to 28 U.S. Code § 1364 Action to Compel an Officer of the United States to perform his duty. Bob's Complaint was promptly dismissed.

I will not be allowed to start trial in Detroit with a live patent.

6. Realizing he had access to the CAFC, Bob appealed [No. 84-1849]. Appearing before Chief Judge Howard T. Markey, Bob

said to the panel:

> I have conducted myself in the way the law requires. I have hired officers-of-the court. For 13 years and 2 months they have been considering the validity of my patent. I think that through that process they are making a mockery out of the patent laws, and I think that is under your jurisdiction.
> ...
> **I will not be allowed to start trial in Detroit with a live patent.**

and he wrote to the CAFC:

> Kearns' petition identifies ... practices which allow legal defenses against patent infringement to be so effective, the patent laws then provide "inadequate or nonexistent patent protection."[9]

7. Not receiving a remedy from the CAFC,

---

[9] As stated at p. 91, line 24 in the President's Commission on Industrial Competitiveness report of January 11, 1985; which also reported at p. 337, line 35:

"Innovators must have the unqualified right to produce and market their own inventions if they are to be able to continue to innovate and contribute to technological advances."; and, at p. 91, line 18

"Increasingly American firms are being denied the benefits of their own inventions."

Bob filed a petition for a writ of certiorari on May 25, 1985 [No.85-645].[10]

The jury found
Ford infringed six patents.

8. Ford assembled electronic IWWSs in their products beginning with the model year 1969. On January 3, 1990, 16 months

---

[10] Presenting the following questions to this Supreme Court:

1. Is a patent a contract?
2. When is the constitutional command to "secure" met?
3. How is the inventor's consideration effected by the judicial process?
4. Is the U.S. of A. itself subject to the constitutional standard of consideration to the inventor?
5. What standard of validity does an inventor need to establish for an entry of an injunction?
6. Since an inventor's common law right to practice his invention in secret cannot be restored after the issuance of his patent, how harmed is (s)he by the court's entertainment of a post-issue-date challenge to the validity of his patent?
7. Did not the Court of Appeals for the Federal Circuit err in affirming the dismissal of Kearns' complaint by the Claims Court?

after Bob's patents in litigation **routinely expired**, Judge Cohn took Bob's Complaints out of order[11] and discovery for trial began for *Kearns* v. *Ford Motor Co.*. After claiming since 1969 (21 years) that Ford products did not infringe Bob's U.S. patents, Ford presented no defenses for

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[11] In doing so, Judge Cohn skipped *SWF-SPECIALFABRIK fur AUTOZEBEHOR GUSTAV RAU G.m.b.H.*, ("SWF") *a corporation of the Federal Republic of Germany* v. *ROBERT W. KEARNS* v. *WOODS MOTORS, INC.*, *DAIMLER-BENZ* ("Mercedes") *AKTIENGESELLSCHAFT*, and *DR. ING. h.c.f. PORSCHE A.G.*, ("Porsche") Civil No. 78-CV-70642.

SWF supplies to Mercedes and Porsche IWWSs that infringe Dr. Kearns patents. SWF is a wholely owned subsidiary of ITT Corp. See Dr. Kearns' Petition for Writ of Certiorari No. 85-645.

Judge Cohn as a co-partner of W.S. Properties structured a sale of property he owned through Comerica Bank of Detroit to ITT Corp. on 30 Dec. 1987. SWF, Mercedes and Porsche haven't come to trial in 17 years.

infringement in the pre-trial order and admitted that all 20,500,000 vehicles they assembled since 1969 that included IWWSs infringed Bob's patents if his patents were valid.

9. *Chrysler* stipulated to be bound by the validity result found in *Kearns* v. *Ford*.

10. The jury found all six patents litigated in *Kearns* v. *Ford* to be valid.

11. Bob's trial lawyer moved the court for a hearing at which he would present evidence of Bob's entitlement to equitable relief under 35 U.S.C. § 283 which was vehemently denied by Judge Cohn.

The jury found
Chrysler and American Motors
infringed four patents
found valid in Ford.

12. On December 10, 1991 the jury returned a verdict in *Kearns* v. *Chrysler Corp. and American Motors Corp.* that every vehicle they assembled that included IWWSs infringed Bob's patents.

13. At a status conference on January 7, 1992 there was said:

> THE COURT: No, I'm not.
>
> But I will tell you this. **If Dr. Kearns does not get lawyers, his cases are going to be dismissed.** He brought them, it's his obligation to prosecute them, and its his obligation to find counsel. Now that's just what he has to do, and I don't intend to impose on Mr. Aitken, but no one waits around more than 15 years for someone to get a lawyer.[12]

14. Bob appeared *pro se* in the damage trial in *Kearns* v. *Chrysler Corp. and American Motors Corp.*

15. Bob received as damages/IWWS three times the damages obtained by his lawyers in *Kearns* v. *Ford.*

16. Chrysler's weighted average profit and net profit was $31.16 and $29.59

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[12] From that statement, Dr. Kearns understands the Detroit District Court has been "wait[ing] around" since Dr. Kearns filed his first patent cause litigation against Judge Cohn's ITT\SWF customers'.

respectively, over the 18 years of infringment.

17. Chrysler's weighted average net profit as a share of revenue was 82% and totalled $399,828,525 without including the profit from American Motors Corp.

18. During the infringing years in which Chrysler excluded Bob from his own market, the average standard of living of U.S. citizens went from 3rd in the world to 10th in the world.

19. Judge Cohn as "W.S. Properties" structured a sale of land he owned to Chrysler Corp. through Comerica Bank of Detroit.

20. The number of infringing units was limited at trial to 11,340,721 for Chrysler and 1,223,386 for American Motors for a total of 12,564,107. Two columns of sales designations were produced for AMC with six columns of sales designations for

Chrysler (A-77).

21. The number of infringing units per Ward's Automotive Reports, etc. was 14,309,548 for Chrysler and 2,204,505 for American Motors for a total of 16,514,053. Eight columns of sales designations are present for Chrysler with six columns of sales designations for American Motors. (A-79) Bob's evidence was denied use.

22. In *Kearns* v. *Ford*, Judge Cohn wrote in his MEMORANDUM AND AWARD OF INTEREST:

> "The rate at which a patent owner must borrow is a reasonable standard for determining interest on an award of damages in the form of a reasonable royalty and neither gives the plaintiff a windfall nor punishes defendant. (A-48)

Bob borrowed at a rate compounded quarterly. Bob was allowed only simple interest in *Kearns* v. *Chrysler and American Motors* with the six year statutory time before filing a Complaint denied any interest at all. This was the time that Bob

built IWWS on three Chrysler cars for their tests; and built, tested and submitted 20 pre-production models (A-67) for submission with his quotation to Chrysler as required by Chrysler's Performance Standard 6338. Judge Cohn denied the interest explaining that:

> Inventor Kearns should have known that Chrysler was only playing with him.

23. Based on Bob's business experienced quotation, Bob's lost profits[13] in *Kearns*

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[13] "Frequently, the patent owner and infringer are the only suppliers in the market, and the owner is seeking to recover profits lost through every sale made by the infringer. *See Water Technologies Corp.* v *Calco Ltd.*, 850 F.2d 660, 672; *Amster Corp.* v *Envirotech Corp.*, 823 F.2d 1538, 1543. In the two-supplier market, it is reasonable to assume, provided the patent owner has the manufacturing and marketing capabilities, that it would have made the infringer's sales. *See Del Mar Avionics, Inc.* v *Quinton Instrument Co.*, 836 F.2d 1320, 1327 (Fed. Cir. 1987). Where there are

v. *Chrysler* was $82,399,089.13 which from the numbers above is about 1/5th of Chrysler's profit on IWWSs. (A-59) (A-64) 24. Bob did not have the benefit of a supplemental submission of costs by Chrysler at a hearing on 18 August 1992. As a result, Judge Cohn would hear no argument from Bob and granted Chrysler $667,322.62 in costs. Bob's office staff did not have a record of receiving the supplemental submission[14] nor was it ever found in

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but two suppliers, [as in Bob's case with Ford, Chrysler, AMC & GM] the law assumes the inventor would obtain the business. The law is clear and well stated. As cited with approval in *State Industries, Inc.* v *Mor-Flo Industries, Inc.*, 883 F.2d 1573 (Fed. Cir. 1989).

[14] The Kearns Offices staffs' normal routine was to record all incoming and outgoing documents with persons assigned to that task.

Kearns Offices. Chrysler offered no proof that the supplemental submission had been delivered to Kearns Offices.

25. At a *Kearns* v. *Ferrari* and *Kearns* v. *GM* status conference held on June 21, 1993 there was said:

> THE COURT (continuing): My understanding is that the Ferrari case has been pushed, Mr. Badenoch, because of a concern over pre-judgment interest. So it is possible that one of -- there are several solutions to the problem that the Court sees.
>
> **One would be, the most drastic would be to dismiss these cases unless he obtains counsel**, on the grounds that he cannot, he cannot, he cannot prosecute.

26. Bob appealed to the CAFC for equitable relief and submitted a Suggestion for Rehearing in Banc in Appeal No. 93-1450, -1470 in *Kearns* v. *Chrysler Corp. and American Motors Corp.*

Mr. Allegretti defended Ford in Kearns v. Ford

27. Mr. Allegretti of the firm Allegretti and Witcoff, Ltd. defended Ford in *Kearns*

v. *Ford*. General Motors Corporation ("GM") hired Mr. Allegretti to defend GM in *Kearns* v. *General Motors Corporation*.

28. On December 8, 1992, Mr. Richard Aitken, Esq. & Mr. William Hall, Esq. who were Bob's lawyers,and Dr. Kearns identified for Special Master Barker: 207 claims infringed by GM models comprising 53 claims of 8 Kearns patents. Subsequently, Bob identified for Master Barker on 6 July '93: 37 claims of 9 patents being infringed by only 4 GM circuits. The 10th patent added is a live patent.

MR. ALLEGRETTI: The only strong criticism I have suffered, your Honor, is that I tried too simple a case for Ford.

29. The 207 claims from the 9 patents were transmitted to Master Barker and made available to GM's Mr. Allegretti.

Mr. Allegretti stated on the record during the status conference of 21 June

'93 at p. 14 of the transcript:

> MR. ALLEGRETTI: The only strong criticism I have suffered, your Honor, is that I tried too simple a case for Ford.

30. Mr. Allegretti was motivated to avoid the litigation of the 207 Kearns claims in 9 Kearns patents identified by Bob to Special Master Barker and Mr. Allegretti and to abuse the judicial process by denying Bob discovery to obtain a dismissal of the litigation for GM. Judge Cohn aided Mr. Allegretti by requiring Bob to specify the claims to be contested at trial before allowing Bob to depose GM engineers to learn in detail how they thought their GM IWWSs operated. Denied discovery, his motion to compel not granted, it was an improper requirement no person caring for the results of the litigation could gamble to meet. A roll of a die being one in seven present better odds for success than three in 207. From the

date that the 207 infringing claims became known, Mr. Allegretti sought first a Summary Judgment; second, a Motion to Dismiss under Fed. R. Civ. P. Rule 41(b); and third a dismissal under Fed. R. Civ. P. Rule 12. The latter motion for dismissal was previously scheduled for hearing on the same day Judge Cohn was informed via 'a judicial courtesy' that Bob's son had paid the fee for a copy of Judge Cohn's financial disclosures[15] which were public records. Bob had no knowledge of his son's activites.

Congressman Knollenberg's aide wrote to Paul Drolet of the House Subcommittee on Administrative Law & Government Relations:

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[15] See Memorandum from Congressman Knollenberg's aide, Eric Feiler, to Paul Drolet of the House Subcommittee on Administrative Law and Government Relations dated July 21, 1993. (A-68)

> Because the Office had informed Mr. Kearns that they had misplaced his check and request, he decided to resubmit them at the Office in Detroit, Michigan. Yesterday, July 20, 1993, at approximately 3:00 p.m., Mr. Kearns submitted a new check and request form for Judge Cohn's financial disclosure records.
>
> Today, the $100 million lawsuit that Mr. Kearns had pending before Judge Cohn was thrown out of court.[16]

THE COURT: You may accuse them on any number you think appropriate.

31. In a pretrial status conference of *Kearns* v. *General Motors* held on Monday, June 21, 1993; p. 7 there was stated:

> DR. KEARNS: Your Honor, there's a question that's still pending because Master Barker had recommended that the case be conducted on the basis of three of General Motor's circuits, and I believe that General Motors thinks that the trial is going forward on five, so I think there's a decision the Court has to make.

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[16] To see how disturbed the Judiciary are with the financial disclosure requirements of the Ethics in Government Act of 1978*see Duplantier* v. *United States*, 606 F.2d 654 (1978).

THE COURT: No, the Court makes no decision until you designate the circuits you accuse.

DR. KEARNS: Well, do I accuse them on three, or do I accuse them on 32, your Honor?

THE COURT: You may accuse them on any number you think appropriate.

p. 11. (continuing) there was stated:

MR. ALLEGRETTI: If your Honor please, I cannot give you a firm response of agreement with that until I consult with my client.

The reasoning is this, if I may just speak a moment.

Special Master Barker had identified five circuits that represented some 92 percent of all the intermittent windshield wipers that General Motors has made. That does not mean that 100 percent of what we made, or even a significant part of the 92 percent that we made, in fact, come under Dr. Kearns' patents. And for that reason, we felt that Dr. Kearns should make an election, either a simple case, settling for maybe 92 percent of our target, or a complex case with 32 (circuits). ...

The *Kearns* v. *General Motors* case was dismissed because Bob designated 32 circuits. Bob was denied the discovery needed

to designate fewer. Moreover Master Barker had no greater engineering information than Bob. See facsimile letter from Master Barker to Dr. Kearns of 6 July '93 at 3:30pm:

> I will assume that any revision or update of this designation will be received here by Fax by 5:00 p.m. today.

Facsimile from Dr. Kearns to Special Master Barker on 6 July '93 at 4:55 p.m.:

> To comply (intelligently) to your order of 3:45 p.m. today, I update my designations <u>to all 32 General Motors circuits</u> v. every claim of every patent I hold.

The *Kearns* v. *General Motors* case was also dismissed because Mr. Allegretti for GM changed his litigation strategy from a direct infringement trial as in *Ford* where the patent claims were compared to Ford products. In *Kearns* v. *General Motors* the civil action by-passed Bob's Motions to Compel Discovery and his requests to depose GM engineers became bargaining chips

for a gamble with the Court which no person caring for the trial outcome could accept without discovery. Continuing with the status conference transcript of June 21, 1993 there was stated at p. 14:

> MR. ALLEGRETTI: The only strong criticism I have suffered, your Honor, is that I tried too simple a case for Ford.

32. In *Kearns* v *General Motors*, Mr. Allegretti conducted the following civil action where the docket events are:

Date	Docket Event	Activity/Document
850131[17]	1	Complaint assign Judge Taylor
850809	6	Case reassigned to Judg Pratt
851220 to 1988	7	Attorney name change (docket sheet blank)
880708	8	Appearance-Kearns' 4th lawyer
880831		**Kearns' patents routinely expire**
881114	9	Appearance of Allegretti (docket sheet blank)
890307	11	Case reassigned to Judge Cohn
900103		*Kearns* v. *Ford* trial begins
900607	13	Pretrial scheduling order
900917	17	Interrogatory #1 Kearns to GM
900917	18	Request Documents Kearnsto GM
901114		*Kearns* v. *Ford* trial ends
910205	19	Status conference
910417	21	K's motion - compel discovery
910620	22	Addition of Kearns' 2d lawyer
910728		Jury select *Kearns* v *Chrysler*
910906	23	ANSWER by GM to objection
9202		GM ltr. deny Kearns discovery
920312	29	ORDER stay 'til further order
920611		*Kearns* v. *Chrysler* trial ends
920811	32	GM's motion for *pro se* Order
920827	34	Pretrial Order- depose Kearns & hold up discovery
921021	44	GM's Motion to Dismiss-R. 12c
921026	47	Order limiting Kearns' *pro se*
921221	59	Kearns response to Dismiss12c
930203		GM's letter deny K discovery
930421	71	Order Deny Dismiss Fed R. 12c
930430	73	K'sMotion to Compel Discovery
930703		**K learns GM is infringing his live patent.** K sends infringement chart to Master Barker that

[17] Date is recorded by: Year Month Day.

includes a live patent.

Docket (con't.)

Date	Event	Activity/Document
930712	82	GM's Motion to Dismiss 2d
930720	88	K's Response Mo to Dismiss 2d
930721		Case dismissed-telephone conf

33. Excerpts of telephone conference from transcript of July 21, 1993:

p. 3 THE COURT: Mr. Allegretti, have you received a copy of Dr. Kearns' Opposition to Defendant's Motion to Dismiss Under Federal Rule of Civil Procedure 41(b)? ... Let me read it to you, if I may.

MR. ALLEGRETTI: Dr. Kearns failed to indicate whether there are any particular claim recitations in any of his asserted patents that require further discovery...

[Note: Dr. Kearns had filed Motions to Compel Discovery.]

THE COURT: Now there are five patents-in-suit, the '836, the '178, the '603, and '936 and '090. Those patents contain multiple claims; is that a fair statement?
...
DR. KEARNS: Yes, your Honor. **The list I gave Master Barker had more patents on it than that.**

I'm going to dismiss the case.

THE COURT: I'm sorry, Dr. Kearns, those are the patents asserted in your bill of complaint.

DR. KEARNS: Your Honor, the purpose of discovery - the only one I knew about at

all when I filed the complaint was Delco 1, and thereafter I learned about the others. That was the list I gave to Master Barker.

THE COURT: Now we do not know which of the claims within, which of the asserted patents are alleged to be infringed. Is that a fair statement?

DR. KEARNS: Well, Master Barker does.

SPECIAL MASTER BARKER: This is Master Barker. We have kicked this around a couple of times. Dr. Kearns and I tried to come up with --

THE COURT: No. I want yes or no answers!..

The Special Master has advised me informally that he believes that he is in a position to promptly force designate the asserted claims. Do you understand what I am saying? He is prepared to make a recommendation to the Court, based upon his knowledge of which claims Dr. Kearns should be limited to asserting in the suit. ...

I cannot, I will not order him to do so unless that is an acceptable resolution of the situation as now exists to General Motors. If General Motors does not accede to what I will call a forced designation, then I am going to proceed with General Motors motion. ...

I'm going to dismiss the case.

34. Judge Cohn subsequently, found the need to issue two Memoranda in support of the dismissal trying to explain his action. From *United States* v. *Moser*, 266

U.S. 236, 238:

> "A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed and never ought to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision." *Fayerweather v. Ritch*, 195 U.S. 276.

* * *

REASONS FOR GRANTING THE WRIT

The success of the framers of the U.S. Constitution in writing a document geared to serving the varied and changing needs of U.S. citizens has been complimented by an ability on the part of successive Congresses and courts to readapt it to changing demands. The best reason to grant this writ is that the best government comes from below, not from above, and in these beginning days of the NAFTA and GATT trade treaties and the Summit of the Americas purpose, it is decision time for this Court as the Judicial Branch operations under 35 U.S.C. § 281 do encourage infrin-

gement rather than deter infringement and those treaties require deterence. Under GATT's Article 41:

> 1. PARTIES shall ensure that enforcement procedures as specified in this Part are available under their national laws so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expedition remedies to prevent infringements and remedies which constitute a deterrent to further infringements ...."

The decisions are important as they affect each branch's interdependent healthy functioning.The lower courts need this court's guidance.

The Patent System and the Modern Economy

Invention preceeds patents that preceed businesses that preceed jobs that preceed the manufacture of the patented products that preceed foreign trade needed to pay for a standard of living that is based upon consumption of products enjoying the economies of scale from world-wide

sales volumes. The Art. I, § 8, Cl. 8's standard of inventor compensation:

> "[S]ecuring for limited times ... the exclusive right to their discoveries..."

has reality only if realized by inventors. Our government must protect <u>each</u> inventor's market as our standard of living is the measure of the summation of the success realized by each inventor in h(is)er market.

A Congressional subcommittee study,[18] *The Patent System and the Modern Economy*, includes the Congressional-Constitutional intent:

> "(T)he patent system provides a protected market with the opportunity for unusual profit necessary to justify the heavy investment in time, effort, and capital necessary to bring the improvement to the public. This same protected market provides an entering

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[18] Study No. 2 of the Subcomm. on Patents Trademarks and Copyrights of the Senate Comm. on the Judiciary, 84th Cong., 2d sess. (1957), page 5. Congress Lib Microfilm #11997.

> wedge by which a business enterprise entering a new field can overcome the obstacles that otherwise discourage entry into an industry already populated."

Government enforced patents, beget exclusive rights that are a shield not a sword for small-growing-to-large businesses. Time in the business begets additional patents in the art first patented. If there is no reality for Bob in this case and no reality for Bob in his other styled cases listed in footnote x, and no 'exclusive' reality for other inventors currently under 35 U.S.C. § 281, there is no promotion, incentive nor reality to be had from the Judicial Branch.

Nineteen out of twenty cases on the civil side of the docket are settled prior to trial.

What are the performance statistics of the Judicial Branch in this regard? Judge Cohn reported the performance at the

District Court level[19] from trial to conclusion:

> Nineteen out of twenty cases on the civil side of the docket are settled prior to trial. **If nineteen out of twenty cases did not settle, I could never handle the load.** That means I am continually trying to determine whether your case is part of the nineteen or is that twentieth.

While over 100,000 patents are issued each year only 1,019 start trial.

The performance of the Judicial Branch from patent issuance to trial is available from a study of the Commissioner of Patents & Trademarks' annual reports. His annual reports for three recent consecutive years reveals that while over 100,000 patents are issued each year only 1,019, on average, result in a Complaint being filed under 28 U.S.C. Fed. R. Civ. P. Rule 3. Of those 1,019, on average, 89 start

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[19] ***Effective Trial Practice: One Judge's View*, Michigan Bar Journal, December, 1982 p. 977.**

trial; of those 89, 39 are before juries. Judge Cohn reports that of those 89, four complete trial, i.e., Judge Cohn predicts 85 of the 89 starting trial will not gain the exclusive rights trumpeted by the Congressional study of footnote 17. If but four inventors are able to stay the course to Judgment out of more than 100,000 U.S. patents issued by the government, those records confirm that the judicial power, which the framers clearly intended to

> "extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made ... under their Authority, ..."

is prohibiting the Executive Branch, operating under Title 35 § 281 from attaining the Legislative Branch's Constitutional choice.

The extent to which 35 U.S.C. § 281 prevents the other Branches from accomplishing their constitutionally assigned functions is 99.996 per cent!

The Supreme Court can grant this writ of certiorari and hear Bob as the extent to which 35 U.S.C. § 281 prevents the other Branches from accomplishing their constitutionally assigned functions is 99.996 per cent! The impact from that assurance of the disruption of the U.S. of A.'s economic industrial competitiveness is not justified by overriding needs to promote objectives within the constitutional authority of Congress. *See* 433 U.S. 425, 443[20] (1977) *Nixon* v.

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[20] The Supreme Court held that the Presidential Recordings and Materials Preseravation Act, 44 U.S.C. §§ 2107 *et seq.*, which preserves various Presidential papers and recordings for governmental and public use contrary to the wishes of former President Richard M. Nixon, does not violate the doctrine of the separation of powers. The Court in *Nixon* did not reach the issue of whether the alleged encroachment upon the executive branch was justified by legitimate congressional objectives, how-

Administrator of General Services.

During Bob's 32 years of patent litigation quagmire the standard of living of the average U.S. citizen has fallen from 3rd in the world to 10th in the world.

Inventors need access to the Supreme Court's wisdom, too.

In the victories *Kearns* v. *Ford Motor Company* and *Kearns* v. *Chrysler Corporation and American Motors Corporation* the Court substituted money that takes away that which the Constitution assures - exclusive time - even when the inventor "wins." The money is from, effectively, a Court issued

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ever, because the Court concluded that the executive branch retained full control of the Presidential papers affected by the Act. There was, therefore, no disruption of executive functions significant enough to trigger separation of powers analysis.

compulsory license[21] which Congress abhores[22] and has rejected numerous times[23]

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[21] *There is no Mystery About Patents*, by Wm. Ballard, J.M. Barrett Corp., *Publishers*, 220 East 42nd Street, New York 17, N.Y. 1946 *See* APPENDIX B.

[22] Congress has frequently been asked to change the policy of the statutes as interpreted by this Court by imposing a forfeiture or providing for compulsory licensing if the patent is not used within a specified time, but has not done so. *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 433, n. 26 and n.27 respectively.

[23] RECOVERY IN PATENT INFRINGEMENT SUITS, Hearing before the U.S. Congress, House Committee on Patents. House of Representatives, 79th Congress, 2d sess.,on H.R. 5231, A Bill to Amend Revised Statutes, 4921 (35 U.S.C. Patents, Sec. 70), Providing That Damages be Ascertained on the Basis of Compensation for Infringement as in Actions for Infringement in the U.S. Court of Claims.(Subsequently amended, reintroduced, and reported as H.R.5311) January 29, 1946

and, by providing money alone to Bob thereby denied the public the benefit of their interest in the invention.

Bob did not disobey,
he was not able to respond.

Bob, as well as the Special Master's staff were not able to answer questions raised by GM drawings produced in the form of only a copy of the title block of the drawing when it contained 'no schematic.' Moreover, the drawings produced were limited by GM to those including and before the 1988 model year.

In short, Bob did not disobey a proper court order of Judge Cohn as adjudged by the CAFC decision, he was not able to respond for lack of information not available to the Special Master as well:

"We (the Special Master's Office) do not have any further circuit information to give you."

S/
Vincent L. Barker, Jr.
Special Master

The CAFC Decision states:

> "Moreover, Sixth Circuit precedents require a finding of willfulness, bad faith, or fault on the part of the disobedient party before dismissal. *Regional Refuse Sys.* v. *Inland Reclamation Co.*, 842 F.2d 150, 153-54 (6th Cir. 1988).

Bob's conduct was not wilful, nor made in bad faith, nor his fault as his motion to compel needed discovery from GM was ignored and he needed drawings and answers.

As the statement of the case outlines, hopefully to the court's satisfaction, Bob was not able to answer Judge Cohn's order for lack of necessary information when he was denied discovery. Bob cited *Smith et al.* v. *Buckeye Incubator Co.*, 2 FRD 134 to show that Fed. R. Civ. P. Rules 26 - 37 are necessary to be used before a "short and plain statement" required under Fed. R. Civ. P. Rule 8 could be flushed out in a pre-trial order for trial.

The Constitution's Art I § 8 Cl. 8 does specify the principle for men to attain equal rights and opportunities since Cl. 8 is class, race and color blind.

There is written in the foreward to the U.S. Constitution as published in the encyclopedia:

> As to the principle that men should have equal rights and opportunities as far as society can assure them, the Constituion was without specific mechanisms for their attainment[24].

But is that last statement true? - And, if not true, and the Constitution's Art I § 8 Cl. 8 does specify the principle for men to attain equal rights and opportunities since Cl. 8 is class, race and color blind is that a reason for the Supreme Court to literally follow Cl. 8's words? That act would greatly improve our trade deficit!

The U.S.' biggest items of trade credit

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[24] **Foreword to *Constitution of the United States* by Paul L. Murphy, University of Minnesota**

are copy-righted movies, plays and music. The item of biggest trade deficit are automobiles, particularly with Japan. Trade means jobs. Trade means higher economies of scale. Trade means higher standards of living for U.S. citizens! Trade is the force driving recent treaties by Congress: of North America Free Trade Agreement ("NAFTA"), General Agreement on Tariffs & Trade ("GATT") and the conference to form a trade treaty bloc extending from Alaska to Argentina in the Summit of the Americas this month of December 1994 in Miami, FL.

Invention precedes products to precede trade.

Weigh and balance when considering the granting of this Petition that the 'Big 3', as well as every other automobile assembler in the western world, do not attempt to sell the wiper motors, intermittent & control electronic module, driver

switch, linkages, blades, and interconnecting cabling forming a pre-engineered subsystem to be installed by the other assemblers. The 'Big-3' do not have the protected-market-patent-base to support the investment required. While Bob's invention was elegant[25] it was stated *supra* that Bob's IWWSs came on the market in 1969. Have you noticed IWWSs has not been improved by the infringers in 25 years - while Bob has 22 additional patents in that art? The 'Big 3' and foreign assemblers attempt to sell the whole automobile as that is their business while Bob's business is manufacturing engineeringly compatible sub-systems generating unique fea-

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[25] "Kearns' intermittent wiper was an elegant piece of engineering." p. 44, beginning 2d full paragraph. *The New Yorker*, Annals of Invention: Windshield-wiper wars: *The Flask of Genius* by John Seabrook, January 11, 1993 issue.

tures that are U.S. and foreign patented. Which is the basis of trade!

The 28 U.S.C. judgments to date issued by Judge Cohn, reciting that Bob's U.S. patents are found valid and infringed by Ford, Chrysler and American Motors and ordering money damages do nothing for the public's standard of living. Those judgments lack equity[26] and do not promote anyone to invent as a money judgment leaves a competitor active in the inventor's area of business start-up opportunity. In receiving the first patent from the Doge, Galileo said it best for all inventors in his **second** statement:

> [I]t is not being fit that this invention, which is my own, discovered by

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[26] Kettering Award Address, Honorable Giles W. Rich, The Vague Concept of "Invention" as Replaced by Sec. 103 of the 1952 Patent Act, 46 J. Pat. Off. Soc'y 855, at 857 (1964)

> me with great labor and expense, be made the common property of everyone."

and second, that if Galileo were granted the privilege:

> I shall the more attentively apply myself to new inventions for universal benefit."

Send all the talented inventors to a park bench upholstered with a million dollars from compulsory license royalties issued through 28 U.S.C. civil actions under 35 U.S.C. § 281 and the public's standard of living does not change. The 28 U.S.C. judiciary seek to promote with money. The Constitution's Art. I § 8 Cl. 8 promotes with time - time to start or add to a business. Time in a business is also what is needed to invent again.

The findings in Global Competition - The New Reality, Vol. II.[27], echo Bob's 28

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[27] The Report of President Reagan's Commission on Industrial Competitiveness, Volume II,

U.S.C. litigation experience. Are such experiences to continue repeating in other inventors experiences as well, when the U.S. of A. trade deficit has been pegged at $10 billion per month and our credits disappeared in March 1984? The interest now adds an equal amount of loss.

Modern engineering requires input and output system compatible components formed into sub-assemblies. Note the number of U.S. engines now in use in Japanese cars.

Bob's revived small growing-to-large business can provide more sub-assembly's world-wide as that is where the patent base flowing from advanced knowledge lies.

Where would the Bell companies be today without the intervention by the Supreme Court in granting certiori in the matter of Western Union?

Automobile assemblers will steal from

Report of January 11, 1985. Available from the Government Printing Office 003-009-00439-0.

Bob to meet the market competition but they are not able to attract capital to support the financial outlays for plant and equipment when they have few patents and no 'protected' market.

Bob has gathered all the automobile assemblers in the western world in the court in Detroit. Judge Cohn stands ready to force a money settlement as "without 19 of 20 cases settling **he couldn't handle the load**" *supra*. Moreover, under the Sixth Circuit's Rule he has dismissed every case. Why? Because he has earned Judicial Senior Status and has a new bride. Bob supports Judge Cohn in his desire to utilize a perc he has earned.

"If I want to go to
the Northern District of Illinois, or
the Middle District of Florida
as a visiting judge,
I may not be able to do so
because of these cases.
You know, that's an incentive
to get rid of them."

RULE OF THE SIXTH CIRCUIT

That a Senior Judge cannot adjudge a case outside his district if a case on his docket is there for more than five years.

10. Moreover, Judge Cohn has stated:

> "THE COURT: Thus, far it seems to me that the only one who has really been thinking about the disposition of these [Kearns] cases is the Judge.
>
> And I have a new problem. All these cases are more than five years old, and the Sixth Circuit had adopted a rule that you can't go out of the circuit as a visiting judge if you have any case on your docket more than five years old. So these cases are likely to pin me to the Eastern District of Michigan. If I want to go to the Northern District of Illinois, or the Middle District of Florida as a visiting judge, I may not be able to do so because of these cases. **You know, that's an incentive to get rid of them.**
>
> I'm not going to ask you to dismiss, Dr. Kearns, and then refile them so the five years starts all over again.[28] I mean, I could do that, but we don't want to do that."

In Bob's manufacture of his IWWS elec-

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[28] Dr. Kearns can only file patent cases during their 'routine life' thus following Judge Cohn's lead would result in his losing all his routinely-expired-during-litigation patent rights.

tronic module alone what is at stake for the U.S. public is 60,000 $25,000 per year jobs. Bob's market can grow to windshield wiper system sub-assemblies that represent 2% of the annual automobile market. That represents sales of 4.8% of the U.S. of A. trade deficit when automotive is our item of biggest trade deficit.

Independent inventors have U.S. patented:[29]

Air Conditioning;
Automatic Transmissions,
Bakelite; Ball-point Pen;
Catalytic Cracking of Petroleum;
Cellophane; Chromium Plating;
Cincerama; Cotton Picker;

---

[29] Notwithstanding the high concentration of research in corporate laboratories, more than half of the important Twentieth Century inventions investigated by Professor John Jewkes and his colleagues, D. Sawers and R. Stillerman, were produced by individuals outside the corporate laboratories. *See* Jewkes, Sawers and Stillerman, *The Source of Invention*, 82-85 (St. Martin's Press 1958).

Cyclotron; Domestic Gas Refrigeration;
Electric Precipitation;
Electron Microscope;
Gyro-Compass; Hardening of Liquid Fats;
Helicopter; Insulin;
Jet Engine; Kodachrome;
Magnetic Recording; Quick Freezing;
Radio; Safety Razor;
Self-Winding Wrist Watch; Streptomycin;
Sulzer Loom; Synthetic Light Polarizer;
Titanium, Xerography;
Zip Fastener.

Bob has experienced that patents are the source:

of small-growing-to-large businesses;
job choice; jobs; **the fountain of:**
standard of living; family life; children;
educational systems; taxes; parks;symphony
prosperity; time to think, thank God, pon-
der & enjoy life;and prvides new knowledge
to teach in the schools
so the cycle repeats.

If we are to survive as a world power - and as a nice place to live - we need to promote science and the useful arts to marshal our ability to innovate, invent, build and produce. That sequence is fostered by the securing to each inventor the Constitutional standard of compensation promulgated in Art. I, § 8 Cl. 8 -

time![30] - now that Congress has chosen a time period of seventeen years.

But Judge Cohn may still present an obstacle to Bob's reason for inventing as 35 U.S.C. § 283[31] is discretionary[32]. From

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[30] Of the various enumerated powers it is the only one which states the purpose of the authority granted Congress. Justice Douglas, dissenting, *Special Equipment Co.* v *Coe*, 324 U.S. 370, 381. "The Congress is given no general power to issue letters patent or to reward inventors as it will."

[31] The possibility of post-expiration equitable relief was raised but not resolved in *Roche Prods., Inc.* v *Bolar Pharmaceutical Co.*, 733 F.2d 858 (Fed. Cir. 1984).

[32] The chief function of informal rules is to regulate official discretion. From page 6 of: *Learning Legal Rules*, by James A. Holland & Julian S. Webb, Blackstone Press Limited, 9 - 15 Aldine Street, London W12 8AW.

By discretion we mean, to quote Professor Galligan:

> "[T]he extent to which officials ... make decisions in the absence of previously fixed,

the Proceedings of 23 July 1992 page 22: "If I had discretion to grant equitable relief in the form that Dr. Kearns prays for, in either the *Ford* case or the *Chrysler* case, based upon the fact the jury found infringement was not willful, I would never exercise that discretion in favor of an injunction. So that while I have heretofore taken the position that I had no power to grant equitable relief Dr. Kearns prays for, I think it should be made clear as we move forward in this case, had I the power[33], absent a finding of willfulness that was affirmed on appeal, I would never consider the exercise of it. That should not give you any comfort, Dr. Kearns, but I think it should allow you to think even further on that point.

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relatively clear, and binding legal standards. Galligan, D. (1986) *Discretionary Powers: A Legal Study of Official Discretion*, Oxford: Clarendon, Press.

[33] An analogous situation to that of Bob's is represented by the decision in *Burr* v. *Ambarch*, 883 F.2d 1071, 1078, vacated, 492 U.S. 902 (1989), reaffirmed on remand, 888 F.2d 258 (2d Cir. 1989). As held in *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964), federal courts have a duty to be alert to provide such remedies as are necessary to make effective the congressional purpose of statutes enacted by Congress.

The third Branch of our government consists only of the Supreme Court. The lower courts are founded by Congressional Statutes. Through enabling legislation Congress allowed the Supreme Court to promulgate the Fed. R. of Civ. P. to the lower courts.

Procedures for a multiplicity of suits are addressed in Rule 19 (joinder of parties to avoid), Rule 23 (class actions to avoid) and 28 U.S.C. § 1407 (multidistrict litigation). With each automotive firm assembling different IWWSs in its different models that all infringe Bob's patents the Rules do not seem adequate.

A principle described by Justice Frankfurter.

Moreover, the inventions protected by each U.S. patent are defined by individual statements of claim. Each product alleged to be infringing can be defined by an engineering drawing. Infringement exists

when the defined claims of a valid patent "read upon" the engineering drawing.

The validity of the patent claims are the responsibility of the U.S. Patent Office. Groups of patent office personnel are assigned to be knowledgeable of each art's patents. Any unfamiliar documents challenging the validity of specific patent claims can be similarly processed by these groups.

Perhaps, a principle described by Justice Frankfurter in *Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952) would be helpful to apply in a remand of this 35 U.S.C. patent case. The principle invokes the doctrine of primary jurisdiction and was cited with approval in *In Re Long Distance Telecommunications Litigation* 831 F.2d 627, 629R (6th Cir '87):

> The Court thus applied a principle, now firmly established, that in cases raising issue of fact not within the conventional experience of judges or

> cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through expertence, and by more flexible procedures.

To lose GM's 70 million infringements involved in this *GM* case would cripple Bob's U.S. exclusive right to the economies of scale needed for him to use his foreign patent base to secure the IWWS foreign sales that are in the public's interest.

> "[A] longstanding principle (is) that federal courts possess wide discretion to impose any remedy ... to make good a violation of federal law." *Franklin* v *Gwinnett County Schools*, No. 90-918 argued 11 December 1991 and decided 26 February 1992.

CONCLUSION

This Court should grant[34] the petition and issue a writ of certiorari to review[35]

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[34] Bob Kearns is proceeding *pro se* and, as such, his motion is held "to less stringent standards than formal pleadings drafted by lawyers." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972)

[35] But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." *Burnet* v. *Coranado Oil & Gas Co.*, 285 U.S. 393, 405-8 (1932) (Brandeis dissenting) Six years later the *Burnet* case was over-ruled. *Helvering* v. *Producers Corporation*, ??? U.S. 176 (1938).

"No one will wish to invent anything if following the inventive act, (s)he unleashes Title 28 Judicial review which at great expense to the inventor, takes away that which the Constitution assures - time!" -Bob.

the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

Robert W. Kearns

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NOTE: Pursuant to Fed. Cir. R 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 33-1535

ROBERT W. KEARNS,
Plaintiff-Appellant

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee.

DECIDED: July 26, 1994

Before LOURIE, RADER, SCHALL, Circuit Judges.

RADER., Circuit Judge.

DECISION

Robert Kearns appears the July 21, 1993, decision of the District Court for the Eastern District of Michigan dismissing with prejudice his patent infringement suit against General Motors Corporation (GM). The district court judge dismissed the suite because Dr.

Kearns, acting pro se, refused to obey pretrial orders. Detecting no abuse of discretion, this court affirms.

BACKGROUND

On January 1, 1985, Dr. Kearns filed a complaint alleging that GM's intermittent windshield wiper circuits infringed five of his patents. Over the next seven years the case remained relatively dormant while Dr. Kearns engaged in litigation with other automotive companies. During this period, Kearns retained and dismissed his legal counsel twice, eventually deciding to proceed with the GM litigation pro se.

On July 31, 1993, the district court issued a pretrial order setting the trial date for October 21, 1992. This order also required Dr. Kearns to specify which claims he would assert and which GM circuits he would accuse of infringement.

On April 20, 1993, the trial court instructed Dr. Kearns to limit the asserted claims to exceed no more than one representation claim per patent-in-suit and to limit the accused circuits to no more than five representative circuits. The trial court set June 21, 1993, as the deadline for Dr. Kearns to specify the claims and circuits.

On June 21, 1993, Dr. Kearns still had not identified the claims and circuits. Although Dr. Kearns had violated this deadline, the district court granted another five days to comply. At this time, the court warned Dr. Kearns that any further delays would result in a dismissal of the case. On June 22, 1993, in response to the trial court's simplification efforts, GM agreed to let its five most common circuits represent 100% of its production, even though a

total of 32 different circuits were produced during the period. On June 24, one day before the deadline, Dr. Kearns asked for another enlargement of time. In his letter requesting the extension, Dr. Kearns asserted all claims in a letter requesting the extension. Dr. Kearns asserts all claims in a 23 of his patents against all 32 GM intermittent windshield wiper circuits, for a total combination of 7,424 claim chart interpretations. In response to this letter, the trial court's special master set July 2, 1993, as the final deadline and reminded Dr. Kearns that there were only five patents in the complaint from which he could choose.

Dr. Kearns did not comply with the July 2, 1993, deadline. At the close of the business day on July 6, four days after the deadline, Dr. Kearns faxed the

special master: "I update to all 32 GM circuits vs. every claim of every patent I hold." On July 9, 1993, GM filed a motion to dismiss on the basis of Kearns' failure to prosecute. On July 21, 1993, after a hearing on the motion, the district court dismissed the case with prejudice. Dr. Kearns subsequently appealed to the court.

DISCUSSION

A district court can use a variety of sanctions to ensure compliance with its orders, including dismissal of the lawsuit with prejudice. Fed. R. Civ. P. 16(f) and 37(b) (2) (C). According to the Supreme Court:

> [Dismissal with prejudice] must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. Metropolitan Hockey Club, Inc., 27 U.S. 639, 643 91976). The Supreme Court further stated:

> The authority of a court to dismiss sua sponte for lack of prosection has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962). Thus, a district court has ample power to dismiss for a party's refusal to obey orders. In reviewing the trial court's action, this court does not inquire whether "as an original matter (it) would have dismissed the action. . . (but) whether the District Court abused its discretion in so doing." Id. at 642.

In the absence of an essential relationship between its exclusive statutory mandate and a procedural issue, this court applies the Federal Rules of Civil Procedures according to the law of

the regional circuit. Biodex Corp. v. Loredan Biomedical, Inc., 946 F.2d 857 (Fed. Cir. 19910. Therefore, this court applies the standard of the United States Court of Appeals for the Sixth Circuit for reviewing dismissals to remedy disobedience to court orders.

In the Sixth Circuit, a trial court may dismiss for disobedience when: (1) the party seeking dismissal suffers prejudice from the insubordination; (2) the disobedient party receives a warning that noncompliance may result in dismissal; and (3) the judge considers imposing less drastic sanctions before ordering dismissal. Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067, 1073 (6th Cir. 1990). Moreover, Sixth Circuit precedent requires a finding of willfulness, bad faith, or fault on the part of the disobedient party before

dismissal. Regional Refuse Sys. v. Inland Reclamation Co., 842 F.2d 150, 153-54 (6th Cir. 1988). As noted above, the dismissal review must be for an abuse of discretion. National Hockey, 427 U.S. at 642. The Sixth Circuit defines abuse of discretion as a "definite and firm conviction that the trial court committed a clear error of judgement." Logan v. Dayton Hudson Corp. 865 F.2d 789, 790 (6th Cir. 1989).

Without question, Dr. Kearns' refusal to obey the court orders prejudiced GM. GM could not reasonably prepare a defense to the infringement charges until it knew exactly which claims Dr. Kearns would assert. Throughout the proceedings Dr. Kearns refused to accept that he could only assert patents listed in his complaint. Moreover, Dr. Kearns refused to comply with the district court's order

to limit his case to one representative claim per patent. There are 51 claims in the five patents listed in the complaint and 232 total claims in all of Dr. Kearns' patents. In the facsimile from Dr. Kearns to the special master of 4:55 p.m., July 6, 1993, Dr. Kearns sought, despite clear orders to the contrary, to assert every claim of every patent he owned. Thus, he knowingly ignored the district court's reasonable order seeking to simplify a highly complex case.

The district court warned Dr. Kearns that continued refusal to comply with orders could would result in dismissal of the case. At the conference on June 21, 1993, the trial court, referring to Dr. Kearns' repeated failure to limit his case as ordered, warned Dr. Kearns:

> I'm going to dismiss this case. Mr patience is at an end. My judicial patience is at an end. Dr. Kearns has

> had more than ample time in which to designate the claims . . . Dr. Kearns is in complete default. A patent case cannot go forward without the claims-in-suit, the asserted claims being designated.

The complete transcript of that hearing shows that the trial court considered the alternative of designating the claims on its own, but decided that dismissal was more appropriate in light of Kearns' repeated refusals to obey pretrial orders.

After carefully examining the record, this court has no "definite and firm conviction that the trial court committed a clear error to judgment." Logan, 865 F.2d at 790. To the contrary, the district court judge made repeated efforts to accommodate the needs of this pro se litigant. As Judge Cohn pointed out in his August 9, 1993, order:

> There is a vast difference between a pro se plaintiff with a meritorious case unable to afford counsel and a pro se plaintiff with a meritorious case declining to employ counsel because of a misplaced lack of trust in lawyers or an inflated opinion notion of his ability to prosecute his own case. Here, we certain have the latter . . .

In a similar vein, the district court judge noted that:

> The civil justice system can absorb just so much abuse from a pro se litigant. Plaintiff clearly exceeded the limit of abuse and for that reason this case is no longer in court.

Dr. Kearns argues that the district court judge wrongly entertained the motion to dismiss under Rule 41(b). The unmistakable language of Rule 41(b) states that a court may dismiss a case for non compliance with "any order of court." Fed. R. Civ.P. 41(b) (emphasis added). Judge Cohn explained that the dismissal was justified because of:

> [t]he confusion, exhibited by plaintiff's papers, his inability to focus his case, his complete failure to comply with the Court's order requiring that the claims-in-suit, be designated . . . and offering no good reason for such failure.

The district court judge could also have used Rule 16, which permits dismissal under Rule 37(b) (2) (C) for failure of a party to comply with pretrial orders "upon motion or the judge's own initiative." Fed. R. Civ. P. 16 (f) (emphasis added). Thus, dismissal was equally appropriate under either Rule 41(b) or Rule 16.

This court has considered Kearns' other arguments and find them with merit.

Because this court finds no abuse of discretion by the trial court, the decision of the district court is affirmed.

July 26, 1994

ERRATA

Appeal No. 93-1535, Robert W. Kearns v. General Motors Corporation

Decided: July 26, 1994

Nonprecedential opinion

Please make the following adjustments:

Page 5, line 6: delete "could"

Page 7, line 1: change "find" to --finds--

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

ROBERT W. KEARNS,) Civil No.

Plaintiff,) 85-70461

v.)

GENERAL MOTORS)

CORPORATION,)

Defendant.

ORDER OF DISMISSAL

For reasons stated on the record on July 21, 1993 because of plaintiff's failure to designate the claim-in-suit this case is DISMISSED.

SO ORDERED.

/s/ Avern Cohn

United States

District Court

DATED: July 21, 1993

Detroit, Michigan

PURSUANT TO RULE 17 ()

FRCIVP COPIES HAVE BEEN

MAILED TO:

Robert Kearns

Dennis Allegretti

Vincent Barker

on 7/21, 1993

/s/ Judy Cassidy

Deputy Court Clerk

UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

ROBERT W. KEARNS,

Plaintiff,

vs. Civil Action

No. 85-70461

GENERAL MOTORS

CORPORATION,

Defendant

_ _ _ _ _ _ _ _ _ _ _ _ _/

Proceedings had in the above-entitled matter before HONORABLE AVERN L. COHN, District Judge, United States District Court, Detroit, Michigan, on Wednesday, July 21, 1993.

APPEARANCES:

ROBERT W. KEARNS

211 West Fort Street

Suite 1401

Detroit, Michigan 48226

Appearing in Pro Se

ALLEGRETTI & WITKOFF

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Boston, Massachusetts 02109

(By: Dennis Allegretti, Esq.)

Appearing on behalf of General Motors

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WITNESS	PAGE
None	

E X H I B I T S

	Admitted
None	

Detroit, Michigan

Wednesday, July 21, 1993

THE COURT: This hearing is on the record.

MR. ALLEGRETTI: Yes, sir.

THE COURT: Dr. Kearns.

DR. KEARNS: Yes, your Honor.

THE COURT: Mr. Allegretti, have you received a copy of Dr. Kearns' Opposition to Defendant's Motion to Dismiss Under Federal Rule of Civil Procedure 41(b)?

MR. ALLEGRETTI: Dr. Kearns called me about 40 minutes ago to ask if I had received this, and I said, no. He indicated he would fax it to me. I was in a meeting with seven other people on another matter. If it has arrived on the Fax machine, I have not yet read it.

THE COURT: Let me read it to you, if I may.

MR. ALLEGRETTI: Yes, sir, please.

THE COURT: Okay.

"Plaintiff Robert W. Kearns, (hereinafter Dr. Kearns), hereby opposes Defendant General Motors Corporation's Motion to Dismiss under Federal Rules of Civil Procedure 41(b). Defendant General Motors Corporation's Motion is based upon the allegations 'for failure to prosecute the pending action,' and 'for failure to comply with the orders of this Court.'

"This cause is being, and has been, disrupted by untoward events: "the law firm who presently, and since November 1988, represents General Motors Corporation, represented Dr. Kearns' patent causes on the same art form 1977 - 1979; "Dr. Kearns' Proposed Court Order on Preliminary Dis-

covery of Defendant's 'IWW Systems' was compromised [Exhibit A]:

"'First, there is no reason for plaintiff to see the individual part numbers and values for each and every component in the circuit . . .

"Second, plaintiff's demand for a written description of the 'structure, operating and function' in addition to the circuit/system diagram, is burdensome . . .

"Accordingly, defendants . . . would limit paragraph one to a circuit/system showing the control module and the motor and switch connections . . .;

"an order was entered by this Court on 26 October 1992 in behalf of judicial efficiency in response to General Motors Corporation's Motion for an

Order Governing Plaintiff's Pro Se Prosection of this action;

"time was consumed in settlement discussions that failed;

"General Motors Corporation's Motion to Dismiss the Complaint pursuant to Rule 12(c) began 20 October 1992 and was not defeated until six months later during which time Dr. Kearns was denied discovery;

"Recent present

In seeing the Master's assistance to discover circuit parameters and other engineering drawings referred to in the General Motors Corporation's compromises submissions to this Court, Dr. Kearns and the Master's staff exchanged nominally 12 facsimiles. With some frustration, the Master finally Faxed on 6 July 1993:

"'This will acknowledge receipt of your many Fax messages over the past

weekend up through and including this morning. We (the Special Master's office) do not have any further circuit information which we can give you.

"I will assume that any revision to update of this designation will be received here by Fax 5:00 p.m. today . . .'

Dr. Kearns revised his designations at 4:55 p.m. 6 July 1993. Since that time the Special Master and Dr. Kearns have made further progress, although 'in confidence, and under seal' pending receipt of the needed technical engineering information, and then, responses from Mr. Hall, Esq., and Dr. Jerome Meisel, Dr. Kearns' experts. Dr. Kearns will submit formal Interrogatories as required by the Federal Rules of Civil Procedure.

"This week-end Dr. Kearns placed packages of the documents (2 1/2 pounds) required, less the technical, engineering information still required, to both his experts. Dr. Kearns visited personally Mr. Hall last week, who is ready to 'go.' and spoke with Dr. Meisel in Maine, who is also ready to 'go.'

Dr. Kearns has 'prosecuted the pending action to the limit of the information which was denied, and is now, naturally, not available, and, has complied with the order of this court.'

"Dr. Kearns resents and strongly objects to being pressured to make up for the time lost by others. Dr. Kearns pursues excellence. Dr. Kearns works ten to 11 hour days, seven days a week, pursuing excellence, and due to part of the untoward events identi-

fied above. This Court is only fooling itself in behalf of 'judicial economy accepting compromised, technical, engineering documents at the advise of those representing infringers, and who know better.

"General Motors Corporation's Motion for another Dismissal should be denied. General Motors Corporation should be ordered to provide the complete technical and engineering information south (as scheduled out in Exhibit A) at this belated, but still necessary, date.

"This is patent case."

Dr. Kearns then attached a letter to me from Kenyon & Kenyon, dated June 28, 1990, and a draft of a "Proposed Court Order on Preliminary Discovery of Defendants' IWW Systems" in the Ferrari case.

That is what Dr. Kearns has filed in response, Mr. Allegretti, to your motion.

Mr. Allegretti, do you have anything you want to add to your motion papers?

MR. ALLEGRETTI: Your Honor, I can only make a few observations off the top of my head, without having a chance to reflect on it in any detail.

Dr. Kearns last failed to indicate whether there are any particular claim recitations in any of his asserted patents that require further discovery.

He seems to indicate that he requires two and a half pounds of technical information, which seems a great deal of data at this stage of the lawsuit to establish what claims he is going to assert. I would have thought he had a position as to the claims he is going tot reply upon, and to the extent that he needs more information it can be provided. But if

Dr. Kearns is, in fact, starting from scratch, it is just going to be impossible, your Honor, for us to be ready to present a case on the 15th of November.

I haven't even begun to prepare the testimony of any of my witnesses, or prepare any of my demonstrative exhibits, of the selection of any of my fact exhibits. This preparation of any of the legal conclusions and instructions to the jury. None of this can be done until I know hat we are going to confront.

It's on that frustration that I brought the motion.

My understanding is that the accused circuits are Delco 1, Delco 2, and Delco 3.

DR. KEARNS: That is correct, your Honor.

MR. ALLEGRETTI: I only know that because the Special Master Barker had

indicated that he had a communication from Dr. Kearns.

THE COURT: But those are the accused circuits.

MR. ALLEGRETTI: Delco 1, 2 and 3 represent 72 percent of the total production, and that's an acceptable figure.

THE COURT: Mr. Allegretti.

MR. ALLEGRETTI: Yes, sir.

THE COURT: Delco 1, Delco 2, Delco 3 are the representative circuits for the purpose of this case.

MR. ALLEGRETTI: I accept that. I was just pointing out that I received nothing in writing from Dr. Kearns in that regard.

THE COURT: You received an order of the Court in that regard, and if it's necessary, the Court will memorialize it.

MR. ALLEGRETTI: No. It's not necessary, Judge.

THE COURT: Now there are five patents-in-suit. The '836, the '178, the '603, the '936, and '090. Those patents contain multiple claims;; is that a fair statement?

MR. ALLEGRETTI: That's correct.

DR. KEARNS: Yes, your Honor. The list that I gave Master Barker had more patents on it than that.

THE COURT: I'm sorry Dr. Kearns, those are the patents asserted in your bill of Complaint.

DR. KEARNS: Your Honor, the purpose of discovery, the only one I knew about at all when I filed the complaint was Delco 1, and thereafter I learned about the others. That was the list that I gave to Master Baker.

THE COURT: Now we do not know which of the claims within, which of the as-

serted patents are alleged to be infringed. Is that a fair statement?

DR. KEARNS: Well, Master Barker does.

MR. ALLEGRETTI: I do not, your Honor.

SPECIAL MASTER BARKER: This is Master Barker. We have kicked this around a couple of times. Dr. Kearns and I tried to come up with --

THE COURT: No. I want yes or no answers.

We do not know, as a matter of record, which of the claims in the asserted patents are alleged to be infringed. Is that a fair statement?

SPECIAL MASTER BARKER: That's a fair statement.

THE COURT: Thank you.

Mr. Allegretti, as of today, Dr. Kearns has failed to designate which of the claims in the patents alleged to be

infringed are alleged to be infringed, is that correct?

MR. ALLEGRETTI: That is correct, your Honor.

THE COURT: So he's in complete default.

The Special Master has advised me informally that he believes he is in a position to promptly force designate the asserted claims. Do you understand what I'm saying? He is prepared to make a recommendation to the Court, based upon his knowledge of which claims Dr. Kearns should be limited to asserting in the suit.

Mr. ALLEGRETTI: Yes, your Honor.

THE COURT: I cannot, I will not order him to do so unless that is an acceptable resolution of the situation as now exits to General Motors. If General Motors does not accede to what I will call a

forced designation, then I am going to proceed with General Motors' motion.

Would you like some time to think about that, Mr. Allegretti?

MR. ALLEGRETTI: No, sir. I am concerned with the impact of that. I think it's Dr. Kearns that should be responding, if your Honor force designates the claims from those patents, and their applicability to Delco 1, Delco 2, and 3, I can proceed.

THE COURT: Only if that is an acceptable disposition of your motion. If it is an acceptable disposition of your motion, I am going to proceed, and I'll tell you what I'm going to do.

I'm going to dismiss this case. My patience is at an end. Ft. Kearns has had more than ample time in which to designate the claims. Dr. Kearns was

given a cut-off date of June 21 for claim designation.

On June 21 we held a status conference.

On June 21 the cut-off date was extended to June 25.

on June 24, Dr Kearns requested additional time, and the Special Master on June 30 then set July 2nd.

On July 9 you filed your Motion.

On July 13 I set a hearing for today.

On July 14, Dr. Kearns filed a response to your motion.

On July 16, I issued an order calling his attention to that effect.

Yesterday he filed an additional paper which is not responsive to the motion.

Dr. Kearns is in complete default.

A patent case cannot go forward without the claims-in-suit, the asserted claims being designated.

Now I'm prepared, Mr. Allegretti, the difficulty, of course, in what I am doing is you have to defend it. The alternative to dismissal is a forced designation by the Special Master.

MR. ALLEGRETTI: Your Honor, I would be prepared to defend either of those alternatives, and I would prefer to defend your Honor on the dismissal of the case.

THE COURT: This case is dismissed, and an order to that effect will be entered today.

Dr. Kearns, do you have anything further to say?

DR. KEARNS: Yes, your Honor.

I think that I have conducted myself properly. I believe that I was denied discovery for six months. It interfered with my ability to go forward. I believe that my experts are truly tech-

nical experts, who are not rubber stamps for whatever claims of the patent that I propose to present at trial, but rather they are of such a professional level that they should have the opportunity of doing that themselves.

I have met all of this with the professional idea of what is involved. I do not want anyone to be wasting any time at my expense, and I have given the information, which is the proper way to go. I have explained all of this to the Master.

In addition to that, I presented to the Master a plan whereby validity of the patents would be in a single trial, which is what your Honor has requested, and I showed that by the addition of only two claims that we would be able to have a common validity trial which was your Honor's desire.

So I have gong to quite a few limits. I think that in no way am I limited to what I put in a complaint eight years ago when I'm supposed have discovery occur now.

I have letters from General Motors that denied me discovery until the matter of their previous dismissal had been ruled upon. I haven't had discovery from General Motors, and I went to the Master on the basis that the Master was one that got the technical information which we presently have, and I had hoped that the Master would contact General Motors, which is a lot faster than going through the Federal Rules of Civil Procedure.

But, as I stated in that letter, I would go through the Federal Rules of Civil Procedure to get the information.

As you know, there is a 30 day response time in the Federal Rules.

I believe that I am entitled to the information. I don't believe that General Motors would have sold as many cars as they did if they didn't have the park position on the windshield wiper, and everyone had Delco 1, Delco 2 and Delco 3 parts. Their patents or products, rather, did not park the glade on the glass within the viewing area. I also thought General Motors Drawing, GM-10015, and that drawing was not available to the Master. It's not available to me, but the questions that I asked of the Master were very reasonable. They represent the latest versions that General Motors has. It's my experience that the further their engineers went in time the closer they came to my art.

I believe the list that I gave to Master Barker is proper. He is an officer of the Court. I met his deadlines, and in that I have done the professionally correct thing, which is to send it to both of my experts who are working on it at the present time.

SPECIAL MASTER BARKER: May I be heard, your Honor.

THE COURT: Go ahead, Mr. Barker.

SPECIAL MASTER BARKER: I don't want to dispute everything that Dr. Kearns says. There are certain things that I do not think are correct representations.

For example, I didn't hear that his experts, Mr. Hall and Dr. Meisel were even involved in this process until about a week ago. And to the extent that we were asked to supply him technical information, that was only done on a voluntary

basis because one of my associtates happened to have a GM drawing that contained the answers, and we gave it to him to move discovery along.

DR. KEARNS: I wasn't being critical, Mr. Barker.

THE COURT: Special Master Barker, do you know of anything in the proceedings before you that would have inhibited or prevented Dr. Kearns from complying with the Court's order to designate the asserted claims?

SPECIAL MASTER BARKER: No.

The only difference in approach that I saw, Dr. Kearns, we started after this designation months ago, and only recently did he decide that he wanted to have his experts look at the designation. He did act on that about the middle of the week. Otherwise, it jsut been delayed.

DR. KEARNS: That is the correct procedure to do with any professional person. I don't expect them to simply rubber stamp whatever I'm going to tell them to do . You approach an expert that way.

SPECIAL MASTER BARKER: Dr. Kearns --

THE COURT: Mr. Barker, don't get into an argument. You are to address your comments to me.

Mr. Allegretti, have you heard anyting in the colloguy that suggests that you want to change your position and insist upon your right to have this case dismissed for the reasons previuosly stated on the record?

MR. ALLEGRETTI: I have heard nothign that would change my position, your Honor.

THE COURT: Thank you.

Does anybody have anything further?

I am entering an order, either today or tomorrow, which will read as follows:

ORDER FOR DISMISSAL

For reasons stated on the record, as of July 21, 1993, because of Plaintiff's failure to designate the claims-in-suit, his case is dismissed.

Do you have anything further, Mr. Allegretti?

MR. ALLEGRETTI: No, sir, your Honor.

THE COURT: Do you have anything further, Dr. Kearns?

DR. KEARNS: I Suppose I do, but I'm not prepared to respond at this time.

THE COURT: Thank you.

The hearing is closed.

MR. ALLEGRETTI: Thank you, your Honor.

SPECIAL MASTER BARKER: Good-bye.

REPORTER'S CERTIFICATE

I, HERMAN H. TAPPERT, Official Court Reporter for the United States District Court for the Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

_____

Herman H. Tappert
Official Court Reporter

Detroit, Michigan 48226

United States Court of Appeals for the Federal Circuit

ORDER

Before LOURIE, Circuit Judge, RADER, Circuit Judge, and SCHALL, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate will issue August 31, 1994.

FOR THE COURT,
FRANCIS X. GINDHART,
CLERK

Dated:
August 24, 1994

by/s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: ROBERT W. KEARNS

D. DENNIS ALLEGRETTI

FILED
U.S. COURT OF
APPEALS FOR
THE FEDERAL
CIRCUIT
AUG. 24, 1994
FRANCIS X.
GINDHART
CLERK

KEARNS V. GENERAL MOTORS,
93-1535
(DCT - 85-70461)

****
* Note: Pursuant to Fed. Cir. R. *
* 47.6, this order is not citable *
* precedent. It is a public record*
****

CHRYSLER CORPORATION

September 22, 1966

Mr. David Tann
President
Tann Controls Company
20210 Sherwood
Detroit, Michigan 45234

Dear Mr. Tann:

Your letter of September 14 to Mr. Chesebrough was referred to me because of my responsibility for the planning of all Dodge passenger cars.

We have been evaluating your windshield wiper device since early summer. We hope, if the weather cooperates, to

complete a preliminary evaluation of its feature potential in the next two months.

To date, your system has had more favorable than unfavorable comments; however, we do not see any significant safety advantages. As we complete our evaluation, we will be happy to discuss our specific reaction with you.

Yours every truly,

B. H. Bouwkamp, Manager
Dodge Car Product Planning
and Chief Engineer

EHB:jg
cc: H. E. Chesebrough
G. W. Gibson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,
Plaintiff,

Civil No. 78-70740

v.

FORD MOTOR COMPANY,
Defendant.
_____/

MEMORANDUM AND ORDER
ON AWARD OF INTEREST

This is a patent case. Before the Court is plaintiff's motion for the award of prejudgment interest on the $5,163,842 judgment entered on July 13, 1990 following a jury verdict in plaintiff's favor for damages in the form of a reasonable royalty for the years 1978 through 1988. An earlier jury found plaintiff's intermittent windshield wiper patents valid and enforceable. Defendant conceded infringement. Additional background of the case is described in the Court's

Memorandum and Order on Attorney Fees dated September 28, 1990.

Plaintiff asks for interest at the Michigan statutory rate for prejudgment interest, Mich. Comp. Laws Section 600.6013, compounded and computed quarterly. Defendant, in denigration of its trespass, offers the Court a variety of arguments to lessen the amount requested. Defendant says the rate requested is excessive and must be adjusted downward to prevent plaintiff from realizing what it characterizes as a super compensatory windfall because plaintiff's after-tax receipts must be considered for each of the infringing year, and the tax rate for 1990 is considerably lower than the rates in the infringing years. Defendant also argues plaintiff's misconduct and undue delays require the Court to disallow any interest.

The Court finds defendant's solicitude for the public fisc commendable but of no moment. Plaintiff's personal finances are of no concern to defendant or the Court. As for plaintiff's untoward conduct, the Court finds nothing in the record to suggest defendant was in any hurry to get the case tried or in any way complained prior to trial of misconduct or undue delay. This case, stripped of its excesses and eccentricities is an unexceptional patent infringement case. Defendant has been found to be an infringer and must pay. This means compensating plaintiff for the delay in receipt of the reasonable royalties to which he is rightfully entitled, according to two different juries, assuming the verdict of the first jury on validity and enforceability stands.

Plaintiff cites some half-dozen cases in support of his position. Defendant cites 26 cases in its brief in opposition, including several of the cases cited by plaintiff. Strangely, neither party cites Bott v. Four Star Corp., 229 U.S.P.Q. 241 (E.D. Mich. 1985), aff'd in part and rev'd in part, 807 F.2d 1567 (fed. Circ. 1986), a decision of this Court in the accounting phase of a patent infringement case. In Bott, this Court said:

> 35 U.S.C. Section 284 provides in part,
>
> > Upon finding for the claimant the court shall award the claimant damages . . . , together with interest . . . .
> >
> > Four Star, without citation of authority except the general statement in General Motors Corp. v. Devex Corp., 461 U.S. 648, 656-57 1188-89 (1983), that there are circumstances in which pre-judgment interest should not be awarded, argues against an award of interest to Jac on the grounds that it de-

> layed bringing suit and because of the 1% payment to the Four Star executive which I find irrelevant. . . .
>
> General Motors stands for the proposition that pre-judgment interest should ordinarily be awarded in a patent case. [The Gyromot Corp. v. Champion Spark Plug Co., 735 F.2d 549 (Fed. Circ. 1984)] describes the substantial discretion I have in the matter of interest. Gyromot also holds that both the royalty and loss of profits parts of a damage award should be treated alike in the matter of interest.
>
> B.
>
> I am satisfied that Bott and Jac are entitled to simply interest on their respective damage awards at the prime rate plus 1/2% for each of the years in which infringing sales were made. . . .
>
> Neither the Federal Government Published Prime Rate or the Government Published T-Bill Rate are appropriate. Bott and Jac are each entitled to earn at least the rate of interest they would likely have had to pay were they borrowers. See Lam. Inc. [v. Johns-Mnville Corp., 718 F.2d 1056, 1066, (Fed. Circ. 1983)]. Bott and Jac shall separately state the amount of interest awarded in the form of judgment to be submitted.

229 U.S.P.Q. at 250.

While the circumstances of each patent owner and infringer are, of course, dif-

ferent from those of any other owner and infringer combination, there is no good reason, as far as the Court is concerned, for a departure from its reasoning in Bott.[1] except to increase the rate of interest for each of the infringing years to 2% over prime because of the high likelihood that plaintiff, given his financial inability to become a supplier to the automobile industryk would not have borrowed at the same rate as plaintiffs in Bott. The rate at which a patent owner must borrow is a reasonable standard for determining interest on an award of damages in the form of a reasonable royalty and neither gives the plaintiff a windfall nor punishes defendant. This Court has discretion in the matter, and the 2% over prime interest rate does

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[1]In venire iterum rotam iudicii officium non est.

not give it discomfort or cause it to believe it has abused the latitude allowed under the applicable rule. See Gyromat, 735 F.2d at 557; Lam, Inc., 718 F.2d at 1066.

If the parties cannot agree, which would be a disappointment to the Court, then each shall present a computation by October 15, 1990, and the Court will make the final determination.

SO ORDERED.

AVERN COHN
UNITED STATES DISTRICT JUDGE

DATE: Sept. 27, 1990
Detroit, Michigan

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20515
Telephone: 202-225-3951

Honorable Donald J. Quigg
Acting Commissioner of Patents
and Trademarks
Patent and Trademark Office
Washington, D.C. 20231

Dear Sir:

I have recently received a letter from a colleague in the House which raised a number of interesting policy issues in the area of patent law. Congressman Barnes, on behalf of his constituent, Robert Kearns, has asked that we examine these issues, and I am writing to solicit your views.

In essence, Mr. Kearns' complaint is about the adequacy of damages that may be recovered under the terms of 34 U.S.C. 284. Taking at face value Mr. Kearns' factual assertions, he appears to raise a legitimate issue. He claims that he in-

vented a device integral to the operation of intermittent windshield wipers. He also claims that he was deprived of an opportunity to become a supplier of his invented device by various automotive concerns who also infringed on his patent. He claims that the terms of section 284 do not provide for "adequate" compensation because it is not possible to recover lost profits. He correctly states that the courts have limited the application of the "lost profits" concept to situations where the patent holder could have acted as supplier. See. e.g., Milgo Electronic Corp. v. United Business Communications, Inc., 623 F.2d 645 (10th Cir. 1980). in the case of Mr. Kearns, he claims that the alleged infringers were the same people who controlled the market and denied him entry as a supplier.

Mr. Kearns suggests that the appropriate remedy for his situation is to permit the courts to have the authority to extend the life of a patent. While this may not be the only feasible remedy, he claims that such relief is particularly appropriate when the delay caused by litigation may effectively deny him any use of his patent. Finally, he claims that the relief he seeks is consistent with the logic of various patent term restoration bills.

It would be most helpful to the work of the Subcommittee if you could provide a detailed set of suggestions that would respond to the problem posed by Mr. Kearns. For purposes of policy discussion, it is probably best to assume the facts in the light most favorable to the individual inventor.

Thank you for your assistance on this matter.

Yours very truly,

ROBERT W. KASTENMEIER
Chairman, Subcommittee on
Courts, Civil Liberties
and the Administration
of Justice

RWK:dbr
cc: Cong. Michael D. Barnes

Enclosure

Calculation of Reasonable Lost Profits

2D-12 The quote to Chrysler

$8.25 [App. p. I.]

The sale price of the Daimler-Benz electronic IWWS module, in countries where Kearns' U.S. patents did not apply, (Dr. Kearns did have patents in the automotive assembly countries but where it was applied without any patent considerations, the sales price was $5.05 [Quote 18 April '79 - see document list below].[App. pp. II.-III.]

$5.05

The cost of air-friend shipping to Stuttgart, on a weekly basis, was $0.05 [P017515 -

$5.00 (P044156]

The schematic & parts list is given in PE 55. [App. p. 72] The assembly is given in PE 56. [App. p. 73] The circuit

board master is given in PE 501. [App. p. 74] The Kearns Engineers designed bulk-test, automatic, computer-controlled Production Tester is given in PE 502 - 504. [App. p. 75 - 77]

The cost of parts was:

Printed circuit board	$0.42
Relay	0.92
Transistor	0.085
Capacitor	0.108
Resistor network	0.20
Diode network	0.26
Plastic enclosure	0.25
Shipping box	0.005
	$2.278

{$2.238 P. 043351
[App. p. 78-82]
& P 044156}
[App. p. 83 - 100]

The cost of direct labor was:

Ass'y 5 minutes (5 parts)	$0.30
Check-out, packaging, etc. 2 minutes @ $3.60 per hour	0.12
General & Admin. Exp.	0.28
Depreciation	
Building	0.025
Machinery & Equipment	0.125
Selling & Liaison	0.25
Research & Development	0.20
Interest	0.038
Miscellaneous	0.04
	$1.378
	$3.656

The profitability was $4.594 in May, 1979.

Over time, Kearns Engineers would provide a system-engineered, complete product, where the component parts would add synergism to the total result. There are nominally 90 drawings for the CAFC to view to appreciate the extent of the preparations for manufacture. See documents reflecting arrangements at the beginning:

with Prestolite, the firm that brought the 3-brush motor with diode to the windshield wiper art [P 04007-92[2]][App,. p. 101-107]; (They would supply 3-brush wiper motors compatible with transistor drive per Kearns Engineers design);

with Lake Center Switch, driver-controlled switch with integral variable dwell resistor per Kearns Engineers de-

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[2]Society of Automotive Engineers, paper 660365, A New Variable Speed Permanent Magnet D-C Motor by James A. Purdy, William Diello and Donald S. Perry of The Prestolite Company

sign (Gable Michel, July 11, '67 [P 044-324-25] [App. p. 108-109] and (T. E. Fiddler Assoc., Inc. [P 029521-26] [App. p. 110-113].

with Essex Wire for cable harness subassembly per Kearns Engineers design (D.E. Nelson, Thomas F. Dansbury & W.C. Junkin) [P 044330-31] [App. p. 114-115].

See Kearns Engineers' design (Automatic Computer Control-led) Windshield Wiper System Production Tester [PO 044312-5] {App. p. 116-119]

2-D-13 The lost profit calculation follows using the model year net revenue price which varied annually as did inflation and is a known published number by Chrysler:

PTX 953

Year	Net Revenue per Unit	Lost Profit per Unit	ORDER of 3/12/92 Chrysler Units	Lost Profit	ORDER of 3/12/92 American Motors Units	AMC Lost Profit
						Chrysler sum AMC sum
1977	$25.50?	$3.883	26,771	$ 103,951.79		
1978	$25.50	$3.883	553,452	2,149,054.10		$ 2,253,005.80
1979	$30.17	$4.594	575,316	2,643,001.70		4,896,007.50
1980	$32.56	$4.958	282,276	1,399,524.40		6,295,531.90

AMC # units = 31,354
AMC Lost Profit = $ 155,453.13

AMC total sum = $ 155,453.13

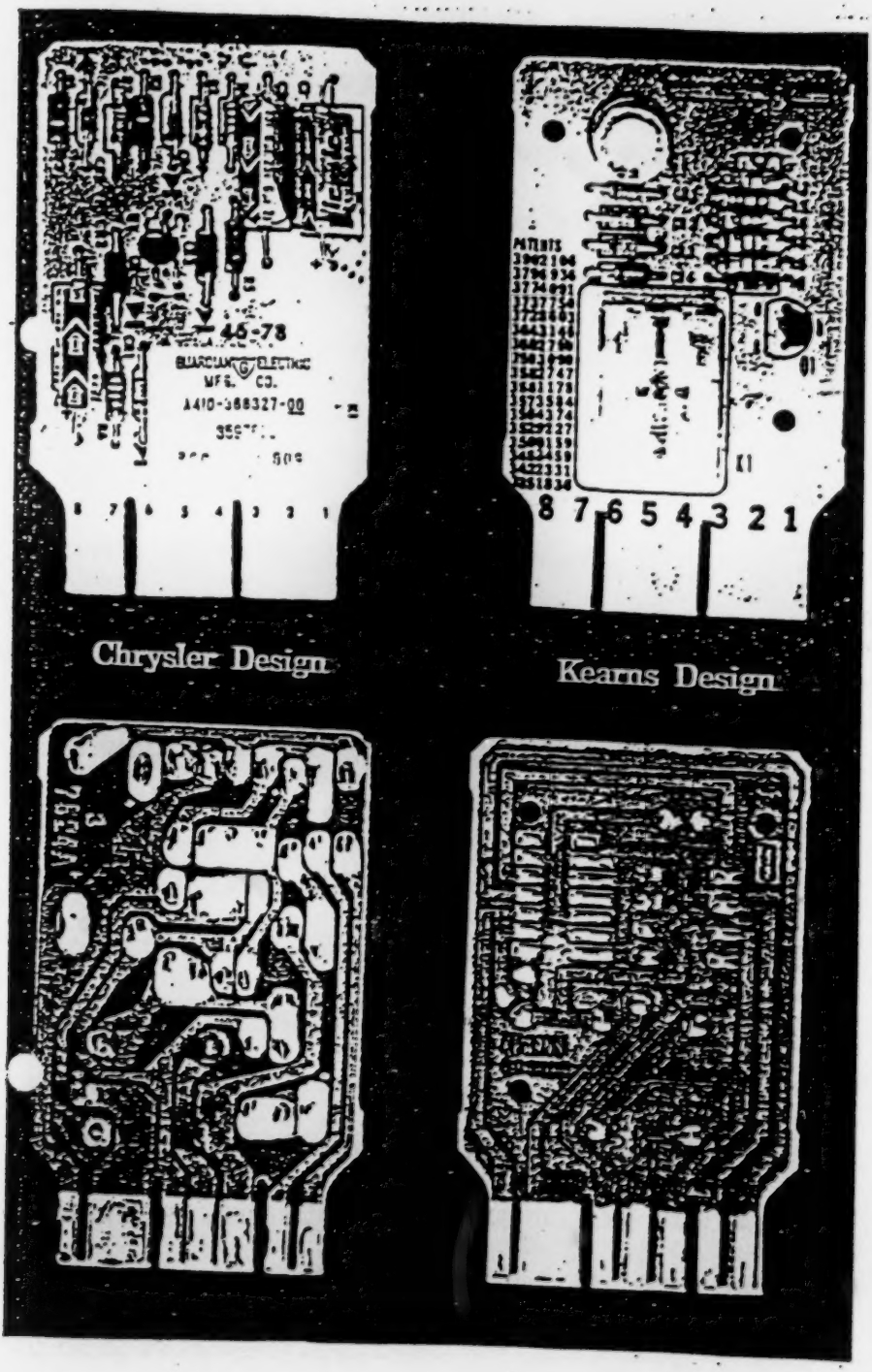
PTX 953

Year	Net Revenue per Unit	Lost Profit per Unit	ORDER of 3/12/92 Chrysler Units	Lost Profit	ORDER of 3/12/92 American Motors Units	AMC Lost Profit
						Chrysler sum AMC sums
1981	$34.25	$5.215	344,900	1,798,653.50		8,094,185.40
			AMC # units =		203,710	
			AMC Lost Profit =		$1,052,347.60	
			AMC total sum =		$1,217,800.73	
1982	$38.41	$5.849	415,042	2,427,580.60		10,521,766.00
			AMC # units =		38,857	
			AMC Lost Profit =		$ 227,274.59	
			AMC total sum		$1,445,075.32	
1983	$42.15	$6.418	763,158	4,897,948.00		15,419,714.00
			AMC # units =		43,734	
			AMC Lost Profit =		$ 280,684.81	
			AMC total sum =		$1,725,760.13	
1984	$43.29	$6.592	1,241,431	8,183,513.10		23,603,227.00
			AMC # units =		89,745	
			AMC Lost Profit =		$ 591,599.04	
			AMC total sum =		$2,317,359.17	
1985	$44.29	$6.744	1,632,542	11,009,863.00		34,613,090.00
			AMC # units =		55,331	
			AMC Lost Profit =		$ 373,152.26	
			AMC total sum =		$2,690,511.43	
1986	$44.65	$6.799	1,645,450	11,187,414.00		45,800,504.00
			AMC # units =		158,441	
			AMC Lost Profit =		$1,077,240.30	
			AMC total sum =		$3,767,751.73	

PTX 953

Year	Net Revenue per Unit	Lost Profit per Unit	ORDER of 3/12/92 Chrysler Units	Lost Profit	ORDER of 3/12/92 American Motors Units	AMC Lost Profit
						Chrysler sum
1987	$48.25	$7.347	1,724,189	12,667,616.00		
						58,468,120.00
			AMC # units =		150,066	
			AMC Lost Profit =		$1,102,534.90	
			AMC total sum		$4,870,286.63	
1988	$48.38	$7.367	1,798,465	13,249,291.00		
						71,717,411.00
			AMC # units =		186,474	
			AMC Lost Profit =		$1,373,753.90	
			AMC total sum =		$6,244,040.53	
1989		$7.367	337,729	2,488,049.50		
						74,205,460.50
			AMC # units =		264,638	
			AMC Lost Profit =		$1,949,588.10	
			AMC total sum =		$8,193,628.63	
			11,340,721	+	1,223,386 =	12,563,107 checks

Chrysler	$74,205,460.50
AMC	8,193,628.63
Dr. Kearns' reasonable lost profits	$82,399,089.13


46-78
GUARDIAN ELECTRIC MFG. CO.
A410-388327-00
8 7 6 5 4 3 2 1
Chrysler Design
PATENTS
8 7 6 5 4 3 2 1
Kearns Design

Congress of the United States

House of Representatives

Washington, D.C. 20515-2211

MEMORANDUM

TO: Mr. Paul Drolet

ORG: House Subcommittee on
Administrative Law and
Governmental Relations

FROM: Eric Feiler

DATE: July 21, 1993

Paul, I wanted to update you on the details of Mr. Kearns' case, and put them in writing. As you recall, Mr. Kearns was attempting to obtain financial re-

cords of Judge Avern Cohn. However, because Mr. Kearns had a case pending before Judge Cohn, he wanted to bypass the courtesy of notifying the Judge that an information request was made as is the practice of the Office of the Committee on Financial Disclosure. At that time, I had contacted the above office, and was told that with a Congressional request, this could indeed be bypassed. Shortly thereafter, I submitted Mr. Kearns' check and request for records to the Office of the Committee on Financial Disclosure.

The office then informed me that it was not possible to bypass this courtesy, and that I should not have been told that it was. I informed Mr. Kearns at that time that this would not be possible. Near the end of May, Mr. Kearns contacted the Office of the Committee on Financial Disclosure and requested that they send

the reports regardless of their policy. Soon thereafter, Mr. Kearns was notified that the Office had misplaced his check and request, and that he would have to resubmit them. Mr. Kearns was also told that the reports for the time period that he had requested were no longer available, and that the Office could only provide updated records (which did not contain the information that MR. Kearns was attempting to obtain). When he asked where he could obtain the desired records, the office told him to request them from Judge Cohn!

Because the Office had informed Mr. Kearns that they had misplaced his check and request. he decided to resubmit them at the office in Detroit, Michigan. Yesterday, July 20, 1993, at approximately 3:00 p.m., Mr. Kearns submitted a new check and request form for Judge Cohn's

financial disclosure records. Today, the $100 million lawsuit that Mr. Kearns had pending before Judge Cohn was thrown out of court.

I have enclosed copies of correspondence between Mr. Kearns and the Office of the Committee on Financial Disclosure that should be helpful in providing names, addresses, phone numbers and dates for some of the many steps that have been taken by Mr. Kearns in order to quietly obtain a copy of a public document.

Thanks for your help, Paul. If you need any further information, please feel free to call me directly

CASE WESTERN RESERVE UNIVERSITY

3 April 1993

Dean James F. Forsyth
Assistant Dean for Admission and Registration
University of Maryland School of Law
500 West Baltimore Street
Baltimore, MD 21201-1786

Dear Dean Forsyth:

I write to support the application for admission to the University of Maryland School of Law of Dr. Robert W. Kearns. I have written hundreds of letters with varying degrees of enthusiasm for my undergraduate and graduate students during my thirty-five years at Case. This letter is the most important endorsement I have ever written!

Robert Kearns was my Ph.D. student at Case Institute of Technology (now Case-Western Reserve University_ from January 1961 until June 1964. He came to Case

following nine years experience as a research at the Bendix Research Laboratories and as a faculty member in the School of Engineering of Wayne State University. His research was extremely creative, productive, and executed with a self-directed maturity nor usually found in the typically-younger graduate student.

I have fifty-six of my graduate Ph.D. students in major search institutions such as Bell Laboratories, IBM, Hewlett-Packard and at major universities such as MIT, Harvard, Stanford, CalTech, and Berkeley. I place Robert Kearns at the very top of this group of outstanding professionals for he not only has the intellectual powers of the very best, but in addition he has a profound sense of mission and unswerving dedication to his personal moral code.

Robert Kearns' reasons for attending law school go far beyond his personal experience with the courts and U.S. patent system; he has experienced the pain, the frustration, the inequity, and finally the victory of his principles and he genuinely wants to gain the knowledge and credentials to permit him to help rectify the legal deficiencies that have hurt him and other so gravely.

I give him my highest recommendation for admission to your School of Law.

Sincerely,

H.W. Mergler
Leonard Case Professor of
Electrical Engineering,
Emeritus

MOTION FOR LEAVE FOR AN *AMICUS CURIAE* BRIEF TO BE FILED IN THIS CASE

The Houston Inventors Association ("HIA") has requested permission to submit an *amicus curiae* brief to this Court. Dr. Kearns gave his permission for them to do so.

GM gave its permission, on the following conditions:

> "Should the HIA agree to inform the Supreme Court of your (Bob's) membership and extent of participation at the outset of the submission and include with that submission a brief description of the organization including total membership, GM would not be opposed to the filing of an amicus brief by them on your behalf."

HIA is an organization of inventors and manufacturers of over 500 members who meet bi-weekly at the Houston Engineering and Science Society in Houston, Texas. Dr. Kearns is an honorary member. The extent of Dr. Kearns' participation is: he gave a speech with Mr. Durkee, Esq.

before the HIA after the conclusion of the *Ford* trial in 1990; Dr. Kearns gave a second speech before the HIA in 1992 concerning his litigation saga and law research. Dr. Kearns was elected to honorary membership after the 1992 speech and has not attended since. HIA's *amicus curiae* brief is to

> "bring relevant matter to the attention of the Court that has not already been brought to its attention by the parties"

in accord with Rule 37.1., and, as such, may not be in 'your [Bob's] behalf' except as he is an inventor, too. The *amicus* brief may be authored and signed by Nobel laureates and Inventor Hall of Fame inducties in addition to HIA officers.

Respectfully submitted,

Robert W. Kearns

Robert W. Kearns, Ph.D.
Inventor, HIA

AMERICAN MOTORS
INTERMITTENT WINDSHIELD WIPER VOLUME INFORMATION
(all data by model year)

	AMC	JEEP™	TOTALS
1979	23,069	8,285	31,354
1980	199,613	4,097	203,710
1981	16,621	22,236	38,857
1982	15,676	28,058	43,734
1983	37,997	51,748	89,745
1984	38,394	16,973	55,331
1985	0	158,441	158,441
1986	12,905	137,161	150,066
1987	13,297	173,177	186,474
1988	47,821	217,017	264,838
TOTAL IWW INSTALLED	405,193	817,193	1,223,386

AMERICAN MOTORS INTERMITTENT WINDSHIELD
WIPER VOLUME INFORMATION
(all data by model year)

YEAR	AMC AUTOMOBILES	AMC JEEP[10]	AMC IMPORTS	AMC EXPORTS	PARTS	REAR IWMS	TOTAL
1979	23,869	8,285		3,305	1,733		36,392
1980	199,613	4,097		21,110	11,241		236,061
1981	16,621	22,236	9,717	2,230	2,540		53,344
1982	15,676	28,058	7,098	1,651	2,624		55,107
1983	37,997	51,748	24,683	6,452	6,929	17,701	145,510
1984	38,394	16,973	11,268	5,919	3,628	109,650	185,832
1985	8,508	158,441	6,192	4,330	13,865	106,490	307,826
1986	12,905	137,161	1,885	2,146	13,835	122,602	290,534
1987	13,297	173,177	2,337	2,661	17,657	152,346	361,475
1988	47,621	217,017	23,406	3,777	24,397	216,206	532,424
TOTAL IWMS INSTALLED	423,701	817,193	86,586	53,581	98,449	724,995	2,204,505

CHRYSLER CORPORATION
INTERMITTENT WINDSHIELD WIPER VOLUME INFORMATION
(all data by model year)

YEAR	U.S. Automobiles	U.S. Trucks	Canadian Automobiles	Canadian Trucks	Exports	After Market Parts	Total
1977	26,771	0	0	0	0	0	26,771
1978	463,244	13,235	75,271	1,393	309	0	553,452
1979	462,663	23,782	775,843	2,525	10,503	0	575,316
1980	216,103	7,348	47,998	4,387	6,442	0	282,276
1981	269,431	31,817	33,086	6,943	3,643	0	344,900
1982	311,715	38,242	37,654	3,456	3,935	0	415,042
1983	582,521	89,457	79,605	5,656	5,916	0	763,158
1984	837,692	256,411	124,486	16,266	6,576	0	1,241,431
1985	1,068,203	376,564	148,401	32,451	6,923	0	1,632,542
1986	1,038,093	341,593	125,573	37,188	7,922	95,081	1,645,450
1987	1,034,530	485,151	129,547	49,536	13,524	11,901	1,724,189
1988	985,698	564,512	140,788	71,291	24,910	11,268	1,798,465
1989	183,237	137,250	20,506	18,356	11,377	0	337,729
TOTAL VW INSTALLED	7,449,901	2,385,360	1,038,738	[illegible]	101,980	118,248	11,340,721

CHRYSLER CORPORATION
INTERMITTENT WINDSHIELD WIPER VOLUME INFORMATION
(all data by model year)

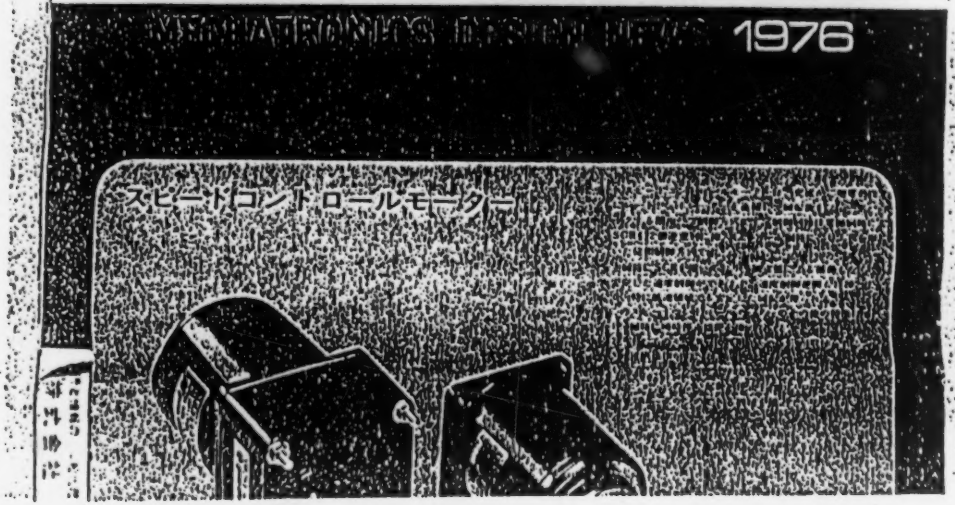
YEAR	U.S. AUTOMOBILES	U.S. TRUCKS	CANADIAN AUTOS	CANADIAN TRUCKS	IMPORTS[1]	EXPORTS	AFTER MARKET PARTS	REAR INMS	TOTAL
1977	26,771	23,852	0	0	1,762	921	2,691	508	56,505
1978	463,244	13,235	75,271	1,393	8,922	14,634	29,106	5,429	611,234
1979	462,663	23,782	75,843	2,525	12,944	13,952	29,957	7,422	629,088
1980	216,183	7,346	47,998	4,387	12,746	5,955	15,862	6,696	316,293
1981	269,431	31,817	33,066	6,943	10,472	4,361	18,879	5,506	379,675
1982	311,715	58,242	37,654	3,496	13,881	3,970	21,810	7,251	458,019
1983	582,521	89,457	79,605	5,659	20,353	6,051	39,517	6,687	829,850
1984	837,692	256,411	124,486	16,266	23,440	6,082	71,918	173,989	1,510,284
1985	1,068,203	376,564	148,401	32,451	24,047	5,516	180,592	356,664	2,112,438
1986	1,038,093	341,593	125,573	37,188	37,668	8,065	180,211	416,045	2,104,436
1987	1,034,530	405,151	129,547	49,536	18,962	12,787	113,288	535,252	2,379,053
1988	985,698	564,512	140,788	71,291	17,537	25,549	118,290	560,420	2,484,085
1989	153,237	137,250	28,506	15,350	11,075	31,268	20,885	49,017	438,588
TOTAL INMS INSTALLED	7,449,901	2,409,212	1,038,738	246,485	213,809	139,111	681,406	2,130,886	14,309,548

[1] Less Canadian figures

機械と電子を結ぶ技術設計誌

メカトロニクス

MECHATRONICS 1976



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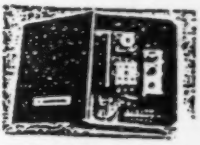

ユニペットウエルダー

クイックナット

小形直流安定化電源

Supreme Court, U.S.
FILED
JAN 26 1995
OFFICE OF THE CLERK

(2)

No. 94-1106

In The
Supreme Court of the United States
OCTOBER TERM, 1994

ROBERT W. KEARNS,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

General Motors Corporation does not have a parent company. Its non-wholly owned subsidiaries that have issued shares to the public are identified below.

Publicly Traded Subsidiaries and Affiliates:

Isuzu Motors Ltd.
Suzuki Motor Corp.

Other Subsidiaries:

AC Bakony Kft.
Adela Investment Co. S.A.
AeroVironment, Inc.
AMBRAKE Corporation
Anadolu Otomotiv Sanayi VE Ticaret A.S.
Applied Intelligent Systems, Inc.
Aralmex, S.A. de C.V.
ARINC Incorporated
Asset Leasing GmbH
Aura S.r.l.
Autos y Maquinas del Ecuador S.A. (AYMESA)
Banque de Credit General Motors
Bujias Mexicanas, S.A. de C.V.
CAMI Automotive, Inc.
CEI Co., Ltd.
Calsonic Harrison Co., Ltd.
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 65 KG
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Leo 40 KG

Other Subsidiaries (Continued):

Centro Tècnico Herramental, S.A. de C.V.
Cilva Holdings Plc
Cimflex Teknowledge
Coalition Undertaking Remedial Efforts, Inc.
Colonial Mortgage Service Company of California
Comau Productivity Systems, Inc.
Compagnie des Faisceaux Tunisiens International S.A.
Compania Nacional de Direcciones Automotrices, S.A. de C.V.
Componentes Delfa, C.A.
Constructora Venezolana de Vehiculos, C.A.
Controladora General Motors, S.A. de C.V.
Convesco Vehicle Sales GmbH
DHB America Inc.
DHB-Componentes Automotivos S.A.
DRB s.a./n.v.
Daewoo Automotive Components, Ltd.
Delkor Battery Company, Ltd.
Detroit Diesel Corporation
Diavia S.r.l.
EDESA Societe Anonyme Holding
EPEC S.A.
Empresa Mixta GEMACVEN, S.A.
Freevale Limited
G. & F. Company
GM Nigeria Limited
G.M.A.C. Financiera de Columbia S.A. Compania de Financiamiento Comercial
General Motors Bankgesellschaft m.b.H.
General Motors Egypt, S.A.E.
General Motors France Automobiles S.A.
General Motors Hungary Automotive Distribution Limited Liability Company (aka General Motors Hungary (Distribution) Ltd.)

Other Subsidiaries (Continued):

General Motors Hungary Automotive Manufacturing Limited Liability Company (aka General Motors Hungary (Manufacturing) Ltd.)
General Motors Kenya Limited
Genie Mecanique Zairois, S.A.R.L.
I. K. Coach Co., Ltd.
IBC Vehicles (Distribution) Limited
IBC Vehicles Limited
ITC Inland Teknik Oto Yan Sanayi Limited Sirketi
Ilmor Engineering, Inc.
Ilmor Engineering, Ltd.
Industries Mecaniques Maghrebines, S.A.
Industrija Delova Automobila, Kikinda
Isuzu-General Motors Australia Limited
Isuzu Motors Limited
Jinbei GM Automotive Co. Ltd.
Kabeltrommel GmbH & Co. KG
Kabelwerke Reinshagen GmbH
Kabelwerke Reinshagen Werk Berlin GmbH (aka Kabelwerke Reinshagen Berlin Plant GmbH)
Kabelwerke Reinshagen Werk Neumarkt GmbH (aka Kabelwerke Reinshagen Neumarkt Plant GmbH)
Macopel, S.A. de C.V.
Mecel AB
Metal Casting Technology, Inc.
Millbrook Pension Management Ltd.
National Car Rental System Inc.
New Cure, Inc.
New United Motor Manufacturing, Inc.
New Venture Gear, Inc.
Omnibus BB Transportes, S.A.
Opel-Automobilwerk Eisenach-PKW GmbH (a/k/a Opel-AWE GmbH)

Other Subsidiaries (Continued):

Opel-Handler Versicherungsdienst GmbH
Opel-Wohnbau GmbH
P. T. Mesin Isuzu Indonesia
PDES, Inc.
PW-Allison Engines
Packard CTA Pty. Ltd.
Packard Electric Vas kft
Penske Transportation, Inc.
Perceptron, Inc.
Promotora de Partes Electricos Automotrices
Qual-Effic Services, Inc.
Robotic Vision Systems, Inc.
Ruedas de Aluminio, C.A.
Saab Automobile AB
Senalizacion y Accesorios del Automovil Yorka, S.L.
Shinsung Packard Company, Ltd.
Sociedad de Comercializacion Internacional Colmotores S.A.
Société Francaise des Amortisseurs de Carbon S.A.
Subaru-Isuzu Automotive, Inc.
Sung San Company, Ltd.
Suzuki Motor Corporation
Truck and Bus Engineering U.K., Limited
United Australian Automotive Industries Limited
Uveral S.A.
Vanguarda Componentes Automotivos, S.A.
Vauxhall Motors (Finance) Plc
View Engineering, Inc.
Volvo GM Canada Heavy Truck Corporation
Volvo GM Heavy Truck Corporation
Woodbridge Foam Deutschland, GMBH

Other Subsidiaries, and Affiliates of Electronic Data Systems Corporation:

Aristacom International, Inc.
BSS Belgique
BSS Greece
BehaviorTech, Inc.
Beijing International Information Processing Company Limited
CAPSCO Software Canada, Ltd.
CLIOR
CLS Corporation
COGSYS Limited
Centigram Communications Corporation
China Management Systems Corporation
Comtrac Corporation
EDS Hellas
EDS-Scicon Defence Limited
Emperion Corporation
Europe Assurance Informatique
F.I.J. (France Informatique Juridique)
Federal Integrated Systems Corporation
First City Bancorporation of Texas, Inc.
GEST'HELP Huissier
GMB Belgique
Healthco Holding Corporation
Hitachi Data Systems Holding Corporation
Hospitality Franchise Systems, Inc.
Infosys
Institut des Techniques Avancees
Interpractice Systems, Inc.
Japan Systems Kabushiki Kaisha (aka Japan Systems K.K.)
LEA GP Incorporated
MCE
Neodata Holdings, Inc.

Other Subsidiaries, and Affiliates of Electronic Data Systems Corporation (Continued):

Nippon EDS Co., Ltd. (aka Nippon EDS Kabushiki Kaisha)
Postal Buddy Corporation
PROGICAL
Riser Foods, Inc.
Simpad, Sociedad Anonima de Capital Variable (aka Simpad, S.A. de C.V.)
Soft-Switch, Inc.
Systems Control Technology, Inc.
Systems Technology Management Corporation
Telecommunications Data Services, Incorporated
The ASK Group, Inc.
Thomas Group, Inc.
Westcott Communications, Inc.
YLYS Informatique

Other Subsidiaries, and Affiliates of Hughes Aircraft Company:

ACCSCO S.A.
AMRAAM International Licensing Company
American Mobile Satellite Corporation
Comlinear Corporation
ELTRO GmbH
ELEKLUFT Elecktronik-und Luftfahrtgerate GmbH
Empresa Nacional de Optica S.A.
FLIR Systems, Inc.
First Portland Technology Corp.
Guiado y Control SA
HBH Company
HESI-FTIC Environmental Sciences, Inc.
Hughes Escorts Communications Limited

Other Subsidiaries, and Affiliates of Hughes Aircraft Company (Continued):

Hughes-JVC Technology Corporation
Hughes-Kenwood RDSS, Inc.
Hughes-Pareto Research Partnership
Hughes Software Systems Private Limited
i-Logix Inc.
Interactive Entertainment, Inc.
International Electro-Optical Industry Anonim Sirketi
International Mobile Machines Corporation
Japan Communications Satellite Company, Inc.
Japan Satellite Communications Network Corporation
Microelectronics and Computer Technology Corporation
Nippon Avionics Co., Ltd.
Pacific Monolithics, Inc.
RALS (RAM Alternate Launcher System)
Satelitron S.A. de C.V.
Societe Lyonnaise d'Informatique Boursiers
Software Productivity Consortium, Inc.
Translant, Inc.
UKADGE Systems Limited

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No. 94-

In The

Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT W. KEARNS,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent General Motors Corporation ("GM") hereby opposes the Petition for Writ of Certiorari filed by Robert W. Kearns ("Kearns") in this case.

STATEMENT OF THE CASE

Kearns' brief in support of his Petition reveals no more than a stubbornly disobedient litigant's attempt to lay blame on the entire "Judicial Branch" of government for the discretionary dismissal of a patent infringement action brought by him against

GM. Kearns' Petition, under the guise of a separation of powers "question", complains about the requirements of the "American Judicial System" and compliance with its rules of orderly procedure, while ignoring the obstinate conduct by him that forced the dismissal of his case. He does so *pro se* after having discharged successive able lawyers previously representing him, and at the final stage of his long litigation against GM which first began in 1985. He represents himself not out of need but by his own free choice, and in defiance of the repeated admonishments of the district court below to seek counsel.

Kearns was repeatedly warned, by the Michigan district court chosen by him for his action, that his willful refusal, while acting *pro se*, to comply with repeated pretrial orders essential to move the case to trial would result in dismissal. He was repeatedly warned to re-enlist counsel. At all relevant times, Kearns had the power as well as the duty to comply with the district court's orders and avoid the risk of such dismissal. It was ultimately Kearns' own stubborn disobedience that compelled a patience-worn federal judge to dismiss his case. (S.A. 12-25). Kearns sought reconsideration of the dismissal, which was denied. (S.A. 10-11). Upon his appeal, the United States Court of Appeals for the Federal Circuit affirmed, finding no abuse of discretion. (S.A. 1-9).[1]

Kearns is not a "Manufacturing-Inventor," as his Petition inappropriately asserts on its face.[2] Kearns merely procured patents directed to controls for use with automotive windshield wipers. Kearns, a litigation opportunist, has sued the entire

[1] Where, as here, the Court is offered an inadequate Appendix containing many typographical errors, it is permissible for the Respondent, under Sup. Ct. R. 15, to include with its Opposition a supplemental appendix containing material permitted by Sup. Ct. R. 14 for the convenience of the Court. GM identifies references to its Supplemental Appendix as "S.A."

[2] Kearns has provided no evidence of record in this case, nor is any discernible in any other case brought by him, to support his assertion that he is a manufacturing-inventor.

automotive industry[3] of the United States with respect to intermittent windshield wiper controls neither designed nor competitively manufactured by him. In pursuing his suit against GM, significant differences between the design of GM's controls and those of other car manufacturers named in his other actions jeopardized any prospect for past damages recovery under his five patents in suit. The expiration of all of those patents also precluded any coercive threat of injunctive relief.

Approaching trial after more than eight years of pendency of his action against GM, Kearns remained unable to identify any patent infringement basis for his original action against GM. He searched in vain for some other basis, but could find none. Despite exhaustive discovery disclosure of all GM controls made prior to expiration of his patents in suit, Kearns obstinately chose instead to refuse to obey the pretrial orders of the district court and define his suit. He thereby obstructed all reasonable, final preparations for an orderly trial.

The district court, after repeated orders and warnings to him, appropriately dismissed his action against GM in accordance with Rules 41(b) and 16(f), Fed. R. Civ. P. (S.A. 12-25). Upon appeal by Kearns, the United States Court of Appeals for the Federal Circuit affirmed, finding no abuse of discretion by the district court below. (S.A. 3-9).

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[3] *Kearns v. Wood Motors, Inc., Daimler-Benz Aktiengesellschaft, and Dr. Ing, h.c.f. Porsche A.G.* (78-CV-70642); *Kearns v. Fred Lavery Porsche, Volkswagen Werke A.G. Solfsburg, and Audi NSU Auto Union, A.G.* (82-CV-70749); *Kearns v. Ferrari S.p.A., AB-Volvo, Alfa Romeo S.p.A., Automobile-Citroen, S.A., Bayerische Motoren Werks, A.G., B-L, PLC (British Leland), Fuji Heavy Industries, Ltd., Group Lotus Cars Co., Honda Motor Co., Isuzu Motor Co., Ltd., Mitsubishi Motors Corp., Nissan Motor Co., Ltd., Officiene Alfiere Maserati, Peugot, S.A., Regie Nationale Renault, Rolls Royce Motors, Ltd., Saab-Scania AB, Toyo Kogyo Co., Ltd. (Mazda), Toyota Motor Co., Ltd.* (85-70459); and *Kearns v. United Technologies Corp. et al* (92-71408).

SUMMARY OF THE ARGUMENT

Kearns has failed to identify, either specifically or by reasonable inference, any question which would justify grant of his Petition and review of the decisions below. No conflicting appeals court rulings can be identified. No departure from accepted and usual judicial proceedings can be shown to have taken place. No unsettled federal law can be defined.

In his Petition, Kearns' questions presented do not dispute the correctness of the appeals court decision affirming the trial court's discretionary dismissal of his patent infringement action. Instead, Kearns improperly "seeks review" *de novo* of issues which have not been presented to or reviewed by the appeals court below.

Accordingly, Kearns' Petition for Writ of Certiorari should be denied by this Court as failing to raise any question which would justify grant of the Petition and review of the lower court decisions.

REASONS FOR DENYING THE PETITION

I. The Questions Presented By Kearns Were Never Presented To Or Reviewed By The Appeals Court Below.

Contrary to Kearns' suggestion, the courts below did not impede him. The nearly eight year pendency of the lower court action was largely attributable to Kearns' own dilatory conduct. During that period, Kearns was subjected to only three court ordered stays, totalling approximately eleven months, and each time for Kearns' own benefit primarily because he was engaged in proceedings with other alleged infringers.

Kearns never sought judicial review by the Federal Circuit below of any issue in this case relating to a claimed entitlement

to have his patents extended *beyond their statutory terms*, so as to retrieve the time of pendency of his infringement action against GM. Both GM and the public in general have been entitled at all times to fully rely upon the statutory expiration of his patents.

It is an abuse of the Petition procedure now to come before this Court, after affirmance on appeal, and seek *de novo* review of questions which were neither presented to nor reviewed by the appeals court below in this action.

II. KEARNS HAS FAILED TO IDENTIFY A QUESTION SUBJECT TO REVIEW UNDER SUPREME COURT RULE 10.

Neither of Kearns' questions presented, nor his Petition in general, meets the standard of Sup. Ct. R. 10. The Federal Circuit affirmed the district court's discretionary dismissal of Kearns' patent infringement lawsuit under Fed. R. Civ. P. 41(b), 16(f), and under its inherent administrative power, for repeated failure by Kearns to obey the court's orders designed to bring the action to trial. In seeking review, Kearns has cited no appeals court decision which conflicts with the Federal Circuit's affirmance, nor has Kearns demonstrated that the Federal Circuit's affirmance "so far departed from the accepted and usual course of judicial proceedings" as to require this Court's supervision. The Federal Circuit reviewed in detail, and specifically identified, the record evidence supporting the holding that the district court committed no abuse of discretion.

In affirming that dismissal, the Federal Court did not decide any question of federal law which is either unsettled or conflicts with applicable decisions of this Court. The Federal Circuit and the district court acted in full accord with *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962)(dismissal for failure to prosecute not an abuse of discretion where "it could reasonably

be inferred . . . from the drawn-out history of the litigation that petitioner had been deliberately proceeding in dilatory fashion.").

III. Both This Court And The Court Of Appeals For The Federal Circuit Have Expressly Declared All Remedies Under A Patent Grant To Be Terminated By Expiration Of The Seventeen Year Statutory Period.

The Constitution authorizes Congress to secure *for limited times* to inventors the exclusive right to their discoveries. Art. I, § 8, cl. 8. Congress exercises that authorization through the Patent Statute, which grants the patent owner the right to exclude others from making, using, or selling the patented invention in the United States for a period of seventeen years from the date of issuance of the patent. 35 U.S.C. § 154 (1988). These rights become public property upon termination of the patent's statutory term, and any further projection of the patent monopoly after expiration is not enforceable. *Brulotte et al.* v. *Thys Co.*, 379 U.S. 29, 30, 32 (1964). In fact, "any attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws." *Scott Paper Co.* v. *Marcalus Co.*, 326 U.S. 249, 256 (1945).

During that limited enforceable lifetime of a patent, the patent owner is authorized to bring a civil action as a remedy for infringement. 35 U.S.C. § 281 (1988). Money damages "adequate to compensate for the infringement" are authorized. 35 U.S.C. § 284 (1988).

In addition to money damages, 35 U.S.C. § 283 (1988) expressly provides for the grant of injunctions "in accordance with the principles of equity" since "[t]he nature of the patent

grant . . . weighs against holding that monetary damages will always suffice to make the patentee whole." *H.H. Robertson Co.* v. *United Steel Deck, Inc.*, 820 F.2d 384, 387-88, (Fed. Cir. 1987). Such equitable relief against *future* infringement, however, is necessarily discretionary with the trial court. 35 U.S.C. § 283 (1988). From the above discussion, it is quite clear that when the rights secured by a patent are no longer protectable by virtue of its expiration, entitlement to injunctive relief is correspondingly no longer available.

The questions which Kearns seeks to have reviewed by this Court are well settled in law and present no conflict either between appeals courts or with the law as set forth by this Court. Post-expiration injunctive relief is simply unavailable under the Patent Laws, and, if granted, would impermissibly extend the statutory term beyond that established by Congress. Congress has the power to provide for patent term extension in appropriate circumstances, *see* 35 U.S.C. § 155, 156 (1988), and it has chosen not to provide for post-expiration injunctive relief under the circumstances where a patent routinely expires during litigation. *See Denkler* v. *United States*, 782 F.2d 1003, 1008 (Fed. Cir. 1986) ("Should Congress wish to extend the [statute's scope], it knows how to do so.").

Accordingly, Kearns' questions presented, which have neither been presented to nor reviewed on any basis or in any forum on appeal below, should not and need not be reviewed *de novo* by this Court.

CONCLUSION

Kearns' Petition for Writ of Certiorari fails to identify any question which would justify grant of the Petition and review of the lower court decisions. Accordingly, Kearns' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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General Motors Corporation

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SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 93-1535

ROBERT W. KEARNS,
PLAINTIFF-APPELLANT,

v.

GENERAL MOTORS CORPORATION,
DEFENDANT-APPELLEE.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan 85-70461

in CASE NO(S).

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

*DATED*_____ _____

Francis X. Gindhard, Clerk

BACKGROUND

On January 1, 1985, Dr. Kearns filed a complaint alleging that GM's intermittent windshield wiper circuits infringed five of his patents. Over the next seven years the case remained relatively dormant while Dr. Kearns engaged in litigation with other automotive companies. During this period, Kearns retained and dismissed his legal counsel twice, eventually deciding to proceed with the GM litigation *pro se*.

On July 31, 1992, the district court issued a pretrial order setting the trial date for October 21, 1992. This order also required Dr. Kearns to specify which claims he would assert and which GM circuits he would accuse of infringement. On April 20, 1993, the trial court instructed Dr. Kearns to limit the asserted claims to exceed no more than one representative claim per patent-in-suit and to limit the accused circuits to no more than five representative circuits. The trial court set June 21, 1993, as the deadline for Dr. Kearns to specify the claims and circuits.

On June 21, 1993, Dr. Kearns still had not identified the claims and circuits. Although Dr. Kearns had violated this deadline, the district court granted another five days to comply. At this time, the court warned Dr. Kearns that any further delays would result in a dismissal of the case. On June 22, 1993, in response to the trial courts simplification effort, GM agreed to let its five most common circuits represent 100% of its production, even though a total of 32 different circuits were produced during the period. On June 24, one day before the deadline, Dr. Kearns asked for another enlargement of time. In his letter requesting the extension, Dr. Kearns asserted all claims in all 23 of his patents against all 32 GM intermittent windshield wiper circuits, for a total combination of 7,424 claim chart interpretation. In response to this letter, the trial court's special master set July 2, 1993, as the final deadline

and reminded Dr. Kearns that there were only five patents in the complaint from which he could choose.

Dr. Kearns did not comply with the July 2, 1993, deadline. At the close of the business day on July 6, four days after the deadline, Dr. Kearns faxed the special master: "I update to all 32 GM circuits vs. every claim of every patent I hold." On July 9, 1993, GM filed a motion to dismiss on the basis of Kearns' failure to prosecute. On July 21, 1993, after a hearing on the motion, the district court dismissed the case with prejudice. Dr. Kearns subsequently appealed to this court.

DISCUSSION

A district court can use a variety of sanctions to ensure compliance with its orders, including dismissal of the lawsuit with prejudice. Fed. R. Civ. P. 16(f) and 37(b)(2)(C). According to the Supreme Court:

> [Dismissal with prejudice] must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). The Supreme Court further stated:

> The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power", governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Link v. *Wabash R.R.*, 370 U.S. 626, 630-31 (1962). Thus, a district court has ample power to dismiss for a party's refusal to obey orders. In reviewing the trial court's action, this court does not inquire whether "as an original matter [it] would have dismissed the action . . . [but] whether the District Court abused its discretion in so doing." *Id.* at 642.

In the absence of an essential relationship between its exclusive statutory mandate and a procedural issue, this court applies the Federal Rules of Civil Procedure according to the law of the regional circuit. *Biodex Corp.* v. *Loredan Biomedical, Inc.*, 946 F.2d 850, 857 (Fed. Cir. 1991). Therefore, this court applies the standard of the United States Court of Appeals for the Sixth Circuit for reviewing dismissals to remedy disobedience to court orders.

In the Sixth Circuit, a trial court may dismiss for disobedience when: (1) the party seeking dismissal suffers prejudice from the insubordination; (2) the disobedient party receives a warning that noncompliance may result in dismissal; and (3) the judge considers imposing less drastic sanctions before ordering dismissal. *Bank One of Cleveland, N.A.* v. *Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990). Moreover, Sixth Circuit precedent requires a finding of willfulness, bad faith, or fault on the part of the disobedient party before dismissal. *Regional Refuse Sys.* v. *Inland Reclamation Co.*, 842 F.2d 150, 153-54 (6th Cir. 1988). As noted above, the dismissal review must be for an abuse of discretion. *National Hockey*, 427 U.S. at 642. The Sixth Circuit defines abuse of discretion as "a definite and firm conviction that the trial court committed a clear error of judgment." *Logan* v. *Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989).

Without question, Dr. Kearns' refusal to obey the court orders prejudiced GM. GM could not reasonably prepare a defense to the infringement charges until it knew exactly which claims Dr. Kearns would assert. Throughout the proceedings

Dr. Kearns refused to accept that he could only assert patents listed in his complaint. Moreover, Dr. Kearns refused to comply with the district court's order to limit his case to one representative claim per patent. There are 51 claims in the five patents listed in the complaint and 232 total claims in all of Dr. Kearns' patents. In the facsimile from Dr. Kearns to the special master of 4:55 P.M., July 6, 1993, Dr. Kearns sought, despite clear orders to the contrary, to assert every claim of every patent he owned. Thus, he knowingly ignored the district court's reasonable order seeking to simplify a highly complex case.

The district court warned Dr. Kearns that continued refusal to comply with orders would result in dismissal of the case. At the conference on June 21, 1993, the trial court, referring to Dr. Kearns' repeated failure to limit his case as ordered, warned Dr. Kearns:

> And I caution you, if it's not done by [June 25, 1993], I will entertain a motion to dismiss the General Motors case for your failure to comply with the orders of the Court. The Court has been more than indulgent with you, Dr. Kearns, more than fair, given you more time than was reasonable.

Thus, Judge Cohn satisfied the Sixth Circuit's requirement that the party receive a warning.

The record also shows that the trial court weighed other options before dismissing the case. The transcript of the hearing on the dismissal date indicates that the district court considered allowing the special master to designate the limited number of claims. Finally, clearly exasperated at Dr. Kearns' failure to prosecute, Judge Cohn declared:

> I'm going to dismiss this case. My patience is at an end. My judicial patience is at an end. Dr. Kearns

> has had more than ample time in which to designate the claims. . . . Dr. Kearns is in complete default. A patent case cannot go forward without the claims-in-suit, the asserted claims being designated.

The complete transcript of that hearing shows that the trial court considered the alternative of designating the claims on its own, but decided that dismissal was more appropriate in light of Kearns' repeated refusals to obey pretrial orders.

After carefully examining the record, this court has no "definite and firm conviction that the trial court committed a clear error of judgment." *Logan*, 865 F.2d at 790. To the contrary, the district court judge made repeated efforts to accommodate the needs of this *pro se* litigant. As Judge Cohn pointed out in his August 9, 1993, order:

> There is a vast difference between a *pro se* plaintiff with a meritorious case unable to afford counsel and a *pro se* plaintiff with a meritorious case declining to employ counsel because of a misplaced lack of trust in lawyers or an inflated opinion notion of his ability to prosecute his own case. Here, we certainly have the latter. . . .

In a similar vein, the district court judge noted that:

> The civil justice system can absorb just so much abuse from a *pro se* litigant. Plaintiff clearly exceeded the limit of abuse and for that reason this case is no longer in court.

Dr. Kearns argues that the district court judge wrongly entertained the motion to dismiss under Rule 41(b). The unmistakable language of Rule 41(b) states that a court may dismiss a

case for noncompliance with "*any* order of court." Fed. R. Civ. P. 41(b) (emphasis added). Judge Cohn explained that the dismissal was justified because of:

> [t]he confusion exhibited by plaintiff's papers, his inability to focus his case, his complete failure to comply with the Court's order requiring that the claims-in-suit be designated . . . and offering no good reason for such failure.

The district court judge could also have used Rule 16, which permits dismissal under Rule 37(b)(2)(C) for failure of a party to comply with pretrial orders "upon motion *or the judge's own initiative*." Fed. R. Civ. P. 16(f) (emphasis added). Thus, dismissal was equally appropriate under either Rule 41(b) or Rule 16.

This court has considered Kearns' other arguments and find them without merit.

Because this court finds no abuse of discretion by the trial court, the decision of the district court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,

Plaintiff,

v. Civil No. 85-70461

GENERAL MOTORS CORPORATION,

Defendant.

ORDER

On July 21, 1993 the Court entered an order dismissing this case for reasons stated on the record. On July 27, 1993 the Court filed a memorandum further explaining its reasons for the dismissal.

On August 4, 1993 plaintiff filed a motion styled PLAINTIFF KEARNS' MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER OF 21 JULY 1993 OR, IN THE ALTERNATIVE, OFFER OF PROOF OF DESIGNATION OF BOTH CIRCUITS & CLAIMS together with a set of exhibits.

LR 7.1 provides

> (3) Grounds. Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled

but also show that a different disposition of the case must result from a correction thereof.

Importantly, since plaintiff's papers do not deal with the reasons for dismissal: failure to designate a representative claim for each of the five patents alleged to be infringed, plaintiff has not demonstrated a palpable defect the correction of which would lead to a different disposition.

There is a vast difference between a *pro se* plaintiff with a meritorious case unable to afford counsel and a *pro se* plaintiff with a meritorious case declining to employ counsel because of a misplaced lack of trust in lawyers or an inflated opinion notion of his ability to prosecute his own case. Here, we certainly have the latter and the motion for reconsideration papers display the same sort of deficiencies which initially caused the Court to conclude dismissal was appropriate. See generally Rubin, *The Civil Pro Se Litigant* v. *The Legal System*, 20 Loyola U. Chi. L.J. 999 (1989).

SO ORDERED.

AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED:

Detroit, Michigan

S.A. 12

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,

Plaintiff,

v. Civil No. 85-70461

GENERAL MOTORS CORPORATION,

Defendant.

MEMORANDUM

On July 21, 1993, the Court entered an Order which reads:

> For reasons stated on the record on July 21, 1993 because of plaintiff's failure to designate the claims-in-suit this case is DISMISSED.

Some further explanation beyond the reasons stated on the record is in order. The explanation follows.

This is a patent case involving allegations of infringement of intermittent windshield wiper patents owned by plaintiff. The complaint was filed January 31, 1985. Typical of a complaint in a patent case the allegations of infringement are conclusionary. Plaintiff alleges ownership of 5 patents as follows:

U.S. Patent No.	Title	Date of Issue
3,351,836	Windshield Wiper System with Intermittent Operation	November 17, 1967
3,581,178	Windshield Wiper Control Device	May 25, 1971
3,728,603	Windshield Wiper Control	April 17, 1973
3,796,936	Windshield Wiper Control Device	March 12, 1974
3,593,090	Intermittent Windshield Wiper System	July 13, 1971

No particular claim is alleged to have been infringed. As to infringement, the complaint simply alleges:

> GM has infringed, and is continuing to infringe, said patents in this District, and elsewhere, by making, using and selling and actively inducing others to make, use and sell intermittent windshield wiper systems and control devices embodying the inventions covered by claims of said patents.

Nothing significant occurred[4] in the case until July 23, 1992 when the Court held its first substantive status conference.

In the interim plaintiff successfully prosecuted patent infringement cases against Ford Motor Company and Chrysler Corporation in which he obtained substantial money judgments. The judgment in the Chrysler case is now on appeal. In the Ford case plaintiff was represented by counsel. In the Chrysler case the plaintiff was represented by counsel in the liability jury trial and appeared *pro se* in the damage jury trial. Plaintiff handled the post-trial matters in the Chrysler case *pro se*. In addition, plaintiff is currently prosecuting a patent case *pro se* against the major Japanese automobile manufacturers while cases against the European manufacturers are stayed.

Plaintiff is prosecuting this case *pro se*.

Following the status conference on July 23, 1992 the Court entered a pretrial order which reads in part:

> 4. The Court will hold a Rule 16 conference on August 13, 1992 at 2:00 P.M. to consider
>
> . . . . . .
>
> 6. A trial date (tentatively set by the Court as October 21, 1993).[5]
>
> . . . . . .

[4] On October 15, 1990, defendant, in an interrogatory, asked plaintiff to identify the claims infringed among other things. This request was renewed on May 17, 1993.

[5] Trial was subsequently scheduled to begin November 15, 1993.

d. Description of the claims-in-suit

e. Designation of the allegedly infringing circuits.

Following a pretrial conference on August 13, 1992 the Court entered a pretrial order which reads in part:

> It became apparent during the conference that there is uncertainty as to the grounds on which plaintiff claims infringement of his patents by defendant's circuits, particularly Delco #1, #2 and #3.

In the interim defendant disclosed to plaintiff each of the intermittent windshield wiper circuits it manufactured during relevant periods and the number of allegedly infringing units as to each such circuit.

On October 26, 1992, the Court entered an order regarding plaintiff's *pro se* representation which reads in part:

> To the extent that Kearns acts as his own counsel, he is subject to the same rules, regulations and sanctions which are applicable to attorneys appearing before the Court under the same circumstances.

The order also admonished plaintiff to obtain counsel rather than represent himself, as the Court had repeatedly done from the moment plaintiff advised the Court he intended to proceed *pro se*. In this connection the Court repeatedly observed on the record plaintiff's inadequacies regarding his *pro se* representation, particularly his woeful lack of understanding of procedure, and what was required of him as his own lawyer.

On December 18, 1992, the Court appointed a special master to report and recommend on defendant's motion for summary judgment. On March 23, 1993, the special master reported and recommended that defendant's motion be denied. The special master's report stated in part:

> The parties have submitted expert witness testimony which conflicts regarding claims interpretation and operation of the accused circuits.

In a footnote the special master recommended that since defendants' Delco circuits #1, #2 and #3 accounted for 73% of all of the allegedly infringing units they "would serve as an equitable representation of all GM circuitry at issue."

On April 21, 1993, the Court entered an order which reads in part:

> Dr. Kearns shall not be limited to the Delco 1 circuit in his pursuit of damages for infringement by GM. However, in the interest of an efficient and manageable trial, Dr. Kearns' cause of action will be restricted to representative claims and circuits designated by the Court at a later date, not to exceed one representative claims per patent-in-suit and not to exceed five representative GM circuits.

On May 6, 1993, the Court expanded the responsibilities of the special master to include all pretrial matters.

The Court, because of its concern over the progress of the case and plaintiff's *pro se* representation, held a status conference on June 21, 1993. June 21, 1993 was also the date by which plaintiff was required to designate the claims-in-suit.[6] At the conference the Court extended to June 25, 1993 the time for plaintiff to designate the claims-in-suit and cautioned plaintiff as follows:

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[6] *See* footnote 1.

> And I caution you, if it's not done by [June 25, 1993] I will entertain a motion to dismiss the General motors case for your failure to comply with the orders of the court. The Court has been more than indulgent with you, Dr. Kearns, more than fair, given you more time than was reasonable. For you to stand there and suggest that you may accuse 32 circuits is beyond my comprehension. There is no jury in the world that could handle a case with 32 accused circuits.

Also, at the conference the Court asked defendant to agree that if plaintiff established infringement of the principle circuits identified as responsible for 92% of defendant's units this would establish infringement of 100% of the accused circuits. After a quick exchange of correspondence between June 22 and July 1, 1993 defendant agreed. Thus, by July 1, 1993 the accused circuits clearly were Delco #1, #2, #3 and #5 and Lectron 5.

On June 24, 1993, plaintiff asked for additional time by letter. The letter inexplicably listed 23 patents owned by plaintiff and the number of claims in each patent for an aggregate of 232 claims. See Exhibit A.

On July 2, 1993, the special master issued an order which reads in part as follows:

> Plaintiff Kearns was to formally designate the patent claims at issue and the GM circuits accused of infringing those claims by Monday, June 21, 1993, in response to GM's interrogatories.
>
> At a special Status Conference held that day in Detroit, Dr. Kearns indicated he had not complied and needed more time. Following this request by Dr. Kearns, the Court gave him until the close of

business Friday, June 25, 1993 to complete such designations. Dr. Kearns has now requested additional time in which to provide the above designation. Kearns based his request upon a lengthy medical examination which was to take place Friday, June 25, 1993. The Special Master understands the timing of such examination prohibited Dr. Kearns from working on such designations on that date. However, such designations were originally due the previous Monday, June 21. The Court extended the time to Friday *at Kearns' request*. Kearns, as is shown in this request of June 24, knew of his medical obligations at the time of the Status Conference and yet said nothing then.

More troubling is his continuing inability to properly prioritize his time: in his request for extension of time, he says that he "planned to write the referenced papers in that order". The "referenced papers" and their order are: (1) his Rule 60 (b) Motion in *Chrysler* regarding the Uruguay Round of the GATT Treaty, and (2) his circuits and claims designations. Kearns gave the "GATT motion" top priority, despite the Special Master's earlier denial of a similar motion in the GM case, and the Court's clear characterization of such GATT motions and issues as frivolous.

This case is set for trial November 15, 1993, some four months from now and substantial discovery remains to be completed. Dr. Kearns can no longer delay the designating of claims at issue and circuits allegedly infringing same. Moreover, Dr. Kearns' letter of June 24, 1993 refers to some 7,424 claim-circuit combinations potentially at issue, involving 23 different patents. There are only five patents in this suit from which to select claims. The five patents-in-

> suit are: 3,351,836; 3,581,178; 3,593,090; 3,728,603; and 3,796,936. With regard to the designation of circuits, the Special Master has previously identified five which represent 92% of GM's production and three circuits which represent 73%. This is the basis from which Dr. Kearns should be selecting.
>
> Accordingly, Dr. Kearns is to provide *complete* and *full* claim and circuit designations by 5:00 P.M. E.S.T. Friday, July 2, 1993, via facsimile with confirming copies by regular mail. *No further extensions of time will be granted.* (original emphasis)

On July 6, 1993, the plaintiff wrote to the special master seemingly indicating he had substantially completed the selection of the claims-in-suit and would confine his assertion of infringement to three circuits. However, he did not designate the claims-in-suit or give any indication as to which particular claims he was asserting were infringed.

On July 9, 1993, defendant filed a motion to dismiss on the grounds plaintiff had "failed to comply with this Court's orders to designate how defendant's circuits infringe which of plaintiff's patent claims thereby prejudicing defendant in the preparation of its case for trial" citing *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 630, 631 (1962) (dismissal for failure to prosecute not an abuse of discretion where "it could be reasonably inferred . . . from the drawn-out history of the litigation that petitioner had been deliberately proceeding in dilatory fashion"); *Carter* v. *City of Memphis, Tennessee*, 636 F.2d 159, 161 (6th Cir. 1980) ("[T]he key is a failure to prosecute, whether styled as a failure to appear at a pre-trial conference, failure to file a pre-trial statement, failure to prepare for conference, or failure to comply with the pre-trial order").

On July 13, 1993, the Court scheduled the motion for hearing on July 21, 1993. On July 13, 1993, plaintiff filed a non-

responsive letter styled "GM preliminary "designated" circuits and claims. . . ." See Exhibit B. The court immediately entered a Memorandum stating:

> Pending before the Court is a motion to dismiss for failure of plaintiff to designate the claims-in-suit as required by an Order of the Special Master dated July 2, 1993. A hearing before the Court is set on the motion for Wednesday July 21, 1993 at 3:30 P.M. On July 14, 1993 plaintiff lodged with the Special Master a paper which purports to designate the claims-in-suit as required by the Order. The paper is patently insufficient and not in conformance with the Order.

Plaintiff filed no further papers with the Court.

In the hearing on July 21, 1993, plaintiff continued to exhibit uncertainty as to which claims of which patents he intended to assert at trial were infringed and offered no good reason as to why he had not yet designated the claims-in-suit. Indeed, he suggested to the Court that he was not limited by the patents listed in the complaint and that perhaps infringement of 10 or more patents could be asserted.

On July 23, 1992, the Court initially set October 21, 1993 as the date of trial. Plaintiff having been through two jury tried patent infringement cases knows of the complexity of such cases and the extended effort necessary to prepare for trial. Plaintiff also knows that to enable a jury to adequately perform its duty it is necessary to limit the number of claims-in-suit and the number of accused circuits. Indeed, the Court had previously ordered such a limitation. As to accused circuits, on April 21, 1993, the special master recommended that the number of representative circuits be limited to 3.

Given the confusion exhibited by plaintiff's papers, his inability to focus his case, his complete failure to comply with

the Court's order requiring that the claims-in-suit be designated by July 2, 1993, and offering no good reason for such failure the Court's only course is to dismiss this case. Had plaintiff been represented by counsel, on the record made here, dismissal would have come at a substantially earlier date. The civil justice system can absorb just so much from a *pro se* litigant.[7] Plaintiff clearly exceeded the limit of abuse and for that reason this case is no longer in court.

AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED:

Detroit, Michigan

[7] "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta* v. *California*, 422 U.S. 803, 835 fn. 46 (1975).

S.A. 21

24 June '93

Re: Rule 60(b) motion with regard to Uruguay Round "frivolous & denied" paper;

Designation of circuits.

Dear Judge Cohn,

I have a doctor's appointment at 10 A.M. this morning in Easton, Mary land. Tomorrow at 9:30 A.M. I have an all day appointment for a whole body physical with Johns Hopkins hospital in Baltimore starting with Dr. Shawn Simpson. I have waited months for this physical opportunity. The hospital telephoned me before the status conference to remind me, and I reconfirmed that I would be there during that call.

I planned to write the referenced papers in that order. You will see why when you read them.

May I have relief beyond 'close of business' tomorrow to designated the circuits of Mr. Allegretti?

Dr. Kearns' IWW U.S. Patent No.	Number of claims	Number of GM circuits	Number of claim charts to review
1. '836	19		
2. '331	23		
3. '459	17		
4. '159	6		
5. '227	17		
6. '374	18		
7. '584	9		
8. '178	9		
9. '747	18		
10. '090	18		

Dr. Kearns' IWW U.S. Patent No.	Number of claims	Number of GM circuits	Number of claim charts to review
11. '790	19		
12. '115	39		
13. '603	1		
14. '750	5		
15. '091	13		
16. '936	7		
17. '910	13		
18. '106	18		
19. '698	16		
20. '059	12		
21. '870 w/son, Tim	23		
22. '889	7		
23. '145	6		
	232 ×	32 −	7,424

cc: Mr. Allegretti
Do you oppose Judge Cohn granting me relief?

Cordially,
Robert W. Kearns
(410) 827-9337 (Tel/Fax)

EXHIBIT A

301 Houghton Lane
Queenstown, Mary land 21658
13 July 1993

William Brinks Olds Hofer Gilson & Lione
Attn: Master Vincent L. Barker, Jr.
1130 Edison Plaza
Toledo, Ohio 43604-1537

Sent by facsimile (419) 244-8862

Dear Master Barker:

Last week I went to Mr. Hall in Potomac, Maryland personally to discuss where we presently are in the cases. He is alerted and ready to work on the trial claims.

I have not been in contact with Dr. Meisel, but will do so promptly.

Judge Cohn asked about combining GM & Farrari in one validity trial. I answered, that if I could have two claims for the '836 patent, I thought he had a "winner" there. [See transcript of 21 June '93 pp. 33 - 36 Exhibits A & B]:

p. 33: THE COURT: Is there any commonality to the patents being asserted?

. . .

p. 36: DR. KEARNS: May I comment on that, your Honor?

THE COURT: Yes.

DR. KEARNS: In the case of the very first patent, the '836, your Honor, I have a patent in there which basically uses wound field motors. It's not the

magnetic field, but rather it's an inductance field. So, what I'm trying to say is, if the Court would allows me two claims in one patent then I think that your Honor's idea is a winner in that the rest of the patents —

THE COURT: Well, we'll see.
Okay.
Now, I have one more matter to deal with.

. . .

Exhibit C is a preliminary list of representative designated circuits and claims for 100% of GM's production of any IWW systems.

EXHIBIT B

It is preliminary in two regards:

1) it is subject to improvement by Mr. Hall & Dr. Meisel, my experts;

and,

2) it is subject to a reduction in number after the validity trial.

Dr. Kearns met his requirements for a Complaint against General Motors Corporation under Rule 11 and Rule 8 with knowledge of the Delco #1 circuit. [Exhibit D] He learned of the additional GM circuits through discovery. Dr. Kearns will seek leave of the Court to revise his Complaint to include the designated representative circuits and patents alleged infringed

to present correspondence with Exhibit C and the Complaint upon gaining said approval from his experts.

As Exhibit C stands, there are ten patents alleged infringed by Delco #1, #2 & #3 involving 11 claims. The '836 including claim 14, the wound field motor claim plus basic claim 16 found valid in *Kearns* v. *Ford*. These designated claims are listed in the column 'Trial Candidate'. Under the column 'Ferrari' are listed those patents and claims designated for that trial.

When the total claims for a combined validity trial are reckoned, there are 13.

Thus, for two more claims, a combined validity trial may be had. The total validity trial, moreover, has the advantage that four claims of the 13 claims were found valid in *Kearns* v. *Ford*. Dr. Kearns will move the Court for such a trial upon approval from said experts.

Hopefully, Exhibit C may serve as a preliminary work guide for the Special Master and the GM defendant until approved and/or modified by said experts.

Respectfully submitted,

Robert W. Kearns, Pro Se
(410) 827-9337

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,

Plaintiff,

v. Civil No. 85-70461

GENERAL MOTORS CORPORATION,

Defendant.

ORDER OF DISMISSAL

For reasons stated on the record on July 21, 1993 because of plaintiff's failure to designate the claims-in-suit, this case is DISMISSED.

SO ORDERED.

AVERN COHN
UNITED STATES DISTRICT COURT

DATED:
Detroit, Michigan